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## SUMMARY

GUILD OF BROADCAST JOURNALISTS AND RESEARCHERS OF THE ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS, AND NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, COMPLAINANTS, AND CANADIAN BROADCASTING CORPORATION, RESPONDENT.

Board Files: 745-3818  
745-3835

Decision No.: 865

## RÉSUMÉ

LE SYNDICAT GUILD OF BROADCAST JOURNALISTS AND RESEARCHERS DE L'ALLIANCE DES ARTISTES DU CINÉMA, DE LA TÉLÉVISION ET DE LA RADIO ET L'ASSOCIATION NATIONALE DES EMPLOYÉS ET TECHNICIENS EN RADIODIFFUSION, PLAIGNANTS, ET LA SOCIÉTÉ RADIO-CANADA, INTIMÉ.

Dossiers du Conseil : 745-3818  
745-3835

Décision n° : 865

In this decision the Board dismissed two unfair labour practice complaints brought against the Canadian Broadcasting Corporation (CBC) by two unions. The complaints by the Guild of Broadcast Journalists and Researchers of the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), and the National Association of Broadcast Employees and Technicians (NABET), both alleged that the CBC interfered with their representation of their members, contrary to section 94(1)(a) of the Code, by introducing measures which fundamentally restructure its broadcasting operations and radically affect the working conditions and employment of the complainants' members, without consulting the complainants.

The complainants did not allege that the measures in question were tainted by anti-union animus. The Board held that the allegations, if proved, do not establish that the CBC's actions had the effect of undermining the status of the trade unions as the representatives of the employees. While refusal to consult may, in some circumstances, constitute an interference with representation and a violation of section 94(1)(a), that section does not impose, as a general rule, a positive requirement that an employer consult with bargaining agents with respect to "any change that is likely to have a drastic and substantial impact on the member of the bargaining unit or their bargaining agent." In the instant case, the integrity (as opposed to the size) of the bargaining units was not compromised. The status of the trade unions as bargaining agents was not subverted.

The Board indicated its intention to entertain written submissions with respect to allegations made by NABET in the second of two replies it filed in response to the reply by CBC to the original complaint by NABET. The Board asked the parties to address the question of timeliness in their submissions.

Dans la décision qui suit, le Conseil a rejeté deux plaintes de pratique déloyale de travail déposées contre la Société Radio-Canada (la Société) par le syndicat Guild of Broadcast Journalists and Researchers de l'Alliance des artistes du cinéma, de la télévision et de la radio et par l'Association nationale des employés et techniciens en radiodiffusion (NABET). Dans leurs plaintes, les syndicats allèguent que la Société est intervenue dans la représentation de leurs membres, en violation de l'alinéa 94(1)a) du Code, lorsqu'elle a introduit, sans consultation, des mesures qui restructurent essentiellement ses activités de radiodiffusion et influent de façon radicale sur les conditions de travail et sur le statut d'emploi de leurs membres.

Les plaignants n'allèguent pas que les mesures en question sont entachées de sentiment antisyndical. Le Conseil a jugé que les allégations, si elles sont établies, ne prouvent pas que les mesures prises par la Société ont miné le statut des syndicats en tant que représentants des employés. Bien qu'un refus de consultation puisse, dans certaines conditions, constituer de l'interférence dans la représentation des employés et une violation de l'alinéa 94(1)a), cet alinéa n'exige pas, en règle générale, que l'employeur consulte les agents négociateurs en ce qui a trait à toute «décision susceptible d'avoir un impact radical et substantiel à l'égard des membres d'une unité de négociation ou de leur agent négociateur». Dans la présente affaire, l'intégrité (par opposition à la taille) des unités de négociation n'a pas été compromise. Il n'a pas été porté atteinte au statut des syndicats en tant qu'agents négociateurs.

Le Conseil a fait état de son intention d'accueillir les observations écrites concernant les allégations faites par NABET dans la seconde réplique qu'elle a donnée à la réponse de la Société à la plainte initiale. Le Conseil a demandé aux parties de traiter de la question du respect des délais dans leurs observations.

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Reasons for decision

Guild of Broadcast  
Journalists and Researchers  
of the Alliance of Canadian  
Cinema, Television and  
Radio Artists,

and

National Association of  
Broadcast Employees and  
Technicians,

*complainants,*

and

Canadian Broadcasting  
Corporation,

*respondent.*

Board Files: 745-3818  
745-3835

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The Board was composed of Mr. J.F.W. Weatherill,  
Chairman, and Messrs. Calvin Davis and J.-Jacques Alary,  
Members.

Appearances:

Messrs. R. Larkin and D. Roberts, for the National  
Association of Broadcast Employees and Technicians  
(NABET);

Mr. D. Hale, for the Alliance of Canadian Cinema,  
Television and Radio Artists (ACTRA);

Mr. R.L. Heenan, for the Canadian Broadcasting  
Corporation (CBC);

Ms. G. Misra, for the Association of Television Producers  
and Directors (ATPD) and for the Canadian Television  
Producers and Directors Association (CTPDA).

These reasons for decision were written by Mr. J.F.W.  
Weatherill, Chairman.

At Toronto on March 11, 1991, the Board heard two unfair labour practice complaints, each alleging violation of section 94(1)(a) of the Canada Labour Code. In file no. 745-3818 (NABET), the complaint is dated December 20, 1990 and, in file no. 745-3835 (ACTRA), it is dated January 7, 1991. The alleged violations in each case are similar, and arise out of the same series of events. The essential allegation in each case is that the respondent violated section 94(1)(a) of the Code by introducing, without consultation, measures which fundamentally restructure the respondent's broadcasting operations and radically affect the working conditions and the employment status of the complainants' members.

These matters were set down for hearing together, the notice sent to the parties indicating that the hearing would be restricted to hearing the parties' arguments as to whether the facts set out in the complaints, as alleged, would, if proven, constitute violations of section 94(1)(a) of the Code. The parties were also invited to submit arguments on the issue of the exercise of the Board's discretion pursuant to section 98(3) of the Code to refuse to hear and determine the complaint. With respect to this latter point, we note that both complainants indicated, in their complaints, that the collective agreements in effect between them and the respondent were not applicable to the instant cases.

By notice dated March 4, 1991, counsel for ATPD and CTPDA sought to intervene in these proceedings, alleging similar violations of the Code with respect to her clients. The respondent objected to the Board's granting intervenor status to these parties.

In file no. 745-3818, counsel for NABET, who had in the usual course filed (on January 23, 1991) a response to the respondent's reply to the complaint, filed a "further reply" in which additional allegations of fact were set out in support of the original complaint.

At the outset of the hearing into this matter, counsel were heard with respect to the request for intervenor status advanced on behalf of ATPD and CTPDA, as well as with respect to the "further reply" filed on behalf of NABET. After hearing full argument, the Board took time for consideration, and gave the following ruling:

*"On the matter of the intervenor status sought by the two producers' organizations, the Board is of the view that such status cannot be granted in this case. As counsel has acknowledged, any complaint by these organizations based on the events complained of by NABET and ACTRA would be untimely. The Board could not entertain such complaints, and accordingly could grant no relief. This by itself distinguishes this case from those cited to us, where the convenience and common sense of granting party status in certain circumstances was stressed. Such considerations do not apply here. It is not, we would add, further information that we seek, but simply argument, as between the parties in the two cases before us, as to whether or not the circumstances referred to in the original complaints, if proved, would establish violations of section 94(1)(a) of the Code. Accordingly the request for intervenor status is denied.*

*On the matter of the effect to be given to what might be called the 'second reply', it is our view that this sets forth a number of allegations of fact quite different from and going well beyond what was set out in the complaint of December 20, 1990 as 'the facts and circumstances' on which the complainant relied. Those facts and circumstances are the ones - together with reference, perhaps, to any material collective agreement provisions - with respect to which the Board wishes to hear argument today. The issue now before us is therefore a narrow one: do the facts alleged in the original complaint show, if proved, a violation of the Code?*

*We do not at this time rule on the questions whether or not the 'second reply' constitutes, in effect, a separate complaint; whether or not, as such, it is timely; or whether or not, as a 'second reply' raising new matters in this file, it should be struck out. All those questions may be addressed by the parties in writing if the matter is sought to be continued. Our ruling today is simply that for the purposes of today's hearing, as the notice of hearing made clear, the issue is whether or not the allegations in the complaint would, if proved, constitute a violation of the Code."*

Section 94(1)(a) of the Code reads as follows:

*"94.(1) No employer or person acting on behalf of an employer shall*

*(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union;..."*

The facts, for the purposes of the present determination, are as follows. On December 5, 1990 the respondent announced that it was introducing measures which would fundamentally restructure its broadcasting operations and would affect the working conditions and the employment status of a considerable number of employees. It did this without engaging in any consultations with either complainant. The collective agreements make no express provision regarding prior consultation in these circumstances. The agreements do contain provisions with respect to reductions in operations, such provisions relating to steps to be taken once the decision to make such reductions has been made. It would appear that those collective agreement provisions have been complied with by the respondent, but of course no question in that regard is before us.

It is the contention of the complainants that an employer interferes with the representation of employees by a trade union where it implements a major restructuring of

operations, which has a substantial effect on employees, without consulting with the union prior to such implementation.

Section 98(3) of the Code provides as follows:

*"98.(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 [which includes complaints of violation of section 94] in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."*

In the instant case, the Board feels the issue raised is one of public interest which it would be appropriate for this Board to consider. We therefore decline to exercise any discretion under section 98(3) of the Code.

It is clear, accepting the alleged facts as true for the purposes of this decision, that they do not permit the conclusion (nor is it argued that they do), that the employer has participated in or interfered with the "formation or administration of a trade union". Section 94(3) has not, then, been violated in that regard. What is argued is rather, as we have noted, that the employer has (not "participated in" but) interfered with the representation of employees by a trade union.

This alleged interference is not said to arise from any positive action on the part of the employer. Rather, the argument is, essentially, that the unions would have been able to represent better or more effectively the employees in the bargaining units for which they are agents had the employer consulted with them and advised them of what it had contemplated, before making its decision and beginning the process of implementation.

This is not an allegation of failure to bargain in good faith: it is not suggested that by withholding relevant plans the employer had in effect misled the unions into signing collective agreements they might otherwise not have signed. In this respect, this case is to be distinguished from Consolidated Bathurst Packaging Ltd. (1983), 4 CLRB (NS) 178 (Ont.). Anti-union animus, however, is not a necessary element of a complaint under section 94(1)(a). Even with the best of intentions, it is simply not open to an employer to interfere with the representation of employees by a trade union.

It is to be noted that what the employer did in the instant case was within the purview of both collective agreements. Each agreement contains a management rights clause, and each contains provisions, although with differing degrees of elaboration, in respect of workforce reductions. The parties might have negotiated a process of consultation in respect of contemplated changes occurring during the life of the collective agreements, but they did not do so. However that may be, the question remains whether or not the employer interfered with the representation of employees by these unions in the circumstances of this case, those circumstances being a major corporate restructuring, involving the closing of stations and the loss of many jobs. Did the employer in this case violate the statutory prohibition set out in section 94(1)(a)?

In Canada Post Corporation (1985), 63 di 136, (CLRB no. 544), a complaint of the same nature as that in the instant case was filed where an employer had unilaterally

and without consultation reorganized its operations in such a way as to exclude from the scope of a collective agreement certain positions which had previously come within it. The Board did not declare that an unfair labour practice had occurred because, as it found, the union had refused to discuss the matter when it found out what the employer had decided. Certain passages in the decision, however, do lend a degree of support to the claimants' positions in the instant case. We would refer particularly, as did counsel for the complainants, to the following:

*"For example, we share the view that an employer who is subject to the Canada Labour Code and who makes major changes to its business without consulting the union may, in certain circumstances, leave itself open to the charge of interference.*

*What changes are we talking about here?*

*To answer this question, we must necessarily rely on practical experience. Although we do not pretend to have an exhaustive or definitive answer, since each case must be considered individually, it seems logical to us that any change that is likely to have a drastic and substantial impact on the members of the bargaining unit or their bargaining agent would fall into this category. In short, we are not thinking here of routine matters or cosmetic changes. The closing of a business, the relocation of a plant, the contracting out to third parties of work performed by union members are all changes that could conceivably, depending on the circumstances, fall into this category. We would also include in this category a change in the organization of a business that results in the mass and permanent abolition of a large number of positions included in a bargaining unit, especially when accompanied by the creation of new positions outside the unit.*

...

*The Board can say ... that section 184(1)(a) [now section 94(1)(a)] of the Code prohibits an employer from simply ignoring the bargaining agent when making such changes. To condone such conduct would be tantamount to 'a rejection of the trade union's statutory role.'..."*

(Pages 162-163)

In that case, as in this, there occurred what was called a "radical reorganization", although that case would not appear to have involved station closings and lay-offs as the instant case does. In that case, there was a substantial transfer of positions out of the bargaining unit, which is not a feature of the present case, although the population of the bargaining units will be reduced. Further, in the Canada Post case, the employer engaged in individual bargaining with employees, and in some cases even refused the union the right to speak for those employees, and refused the employees' requests to be represented by the union. In such circumstances it would be our view as well that there was interference with the representation of employees by a trade union.

That the context in which interference with representation was considered in the Canada Post case was significantly different from that in the instant case appears from the introductory paragraph of the reasons for decision given in Canada Post, supra:

*"In brief, this case concerns the right of an employer to negotiate and conclude individual employment contracts, for positions that it does not consider unionized, with each member of a certified bargaining unit whose positions it intends to abolish. Must the employer first discuss its plans with the certified bargaining agent? Must it allow the employees to be assisted by a union representative when discussing its plans with them?"*

(Page 138)

The Board reviewed the jurisprudence to that point, and set out the following conclusion:

*"This review of the jurisprudence reveals that the protection afforded by section 184(1)(a) [now section 94(1)(a)] against interference*

*takes a number of forms. This protection in fact mirrors the many constantly changing forms that the right to join a union may take, this right constituting, according to the title of section 110 [now section 8] of the Code, one of the 'basic freedoms'. Section 184(1)(a) prohibits both deliberate and unintentional violation of this right. The protection it affords is aimed at both actions that seek to undermine the status of the bargaining agent and those that merely have this effect. It also extends to those actions that compromise the integrity of the bargaining unit which the union represents. Finally, this protection continues to apply both in the absence and in the presence of a collective agreement. This explains what we referred to earlier as the 'omnibus' nature of the protection of section 184(1)(a). ..."*

(Page 160)

In the instant case, there is no allegation that the employer deliberately sought to undermine the status of the trade unions. In our view, the allegations, if proved (and they are not in substantial dispute), do not establish that the employer's actions have the effect of undermining the status of the trade unions as the representatives of the employees. The integrity (as opposed to the size) of the bargaining units was not compromised.

The complaint against the employer, it must be remembered, is one of interference with the representation of employees by a trade union. The complainants argued, in effect, that the employer must have interfered with the trade unions' rights of representation because it had not consulted with the unions on business decisions. On this argument, employers are required, by section 94(1)(a), to consult with bargaining agents with respect to "any change that is likely to have a drastic and substantial impact on the members of the bargaining unit or their bargaining agent" (Canada Post, supra, at page 163). With respect, we

cannot read such a requirement, considered as a general rule, in the prohibition against interference with representation set out in section 94(1)(a), even where that section is given the broad interpretation found in this Board's decisions, and with which we agree.

The decision rendered in Manitoba Pool Elevators (1980), 42 di 27; and [1981] 1 Can LRBR 44 (CLRB no. 272), is an example of a case where refusal to discuss a form of reorganization - by which a group of employees was to be excluded from the bargaining unit - was held (quite correctly, in our respectful view) to constitute interference with the representation of employees by a trade union. The Board's conclusion in that respect is set out as follows:

*"The creation and filling of the so-called out-of-scope positions of service centre managers cannot be compared, in our view, to any normal progression of bargaining unit employees 'through the ranks' to managerial posts. The circumstances surrounding these appointments lead the Board to conclude that the respondent was motivated by the desire attributed to it by the applicant in its submissions 'to get the elevator managers out of the union.' We find that this is a prohibited motivation and that the respondent's implementation of its reorganization plan during September and October of 1979 amounted to improper interference with the role of the applicant as representative of the elevator managers who are members of the bargaining unit. The respondent is thus in violation of section 184(1)(a) [now section 94(1)(a)] of the Code which prohibits interference by an employer in the representation of employees by a bargaining agent."*

(Pages 38; and 52)

The appropriate form of representation may indeed be consultation as opposed to negotiation: (note, in this respect, what the Board said in Canada Post, supra, at page 164), and refusal to consult may indeed, in some

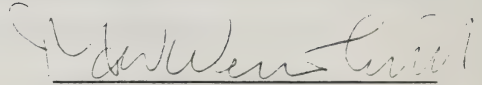
circumstances, constitute an interference with such representation and hence a violation of section 94(1)(a). In the instant case, however, the non-consultation did not, on the facts as alleged, amount to an interference with the representation of the employees by the trade unions. It did not subvert the status of the trade unions as bargaining agents. To conclude otherwise, on the facts before us, would be to elevate the prohibition against interference set out in section 94(1)(a) into a positive requirement of participation in major management decisions having serious effects on employees. Whatever might be the merits of such a provision, it is not set out in section 94(1)(a).

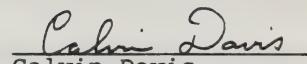
(1) Therefore, the Board finds that there was no violation of section 94(1)(a) of the Code in the circumstances set out in the complaints.

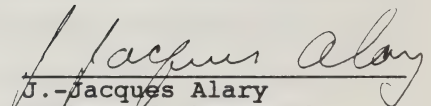
(2) With respect to the "further reply" filed by NABET, the Board will entertain the parties' written representations thereon, provided such representations are submitted by the complainant within 15 days of the date of this decision.

(3) In the event such submissions are made, the question of timeliness, referred to above, should be addressed in such submissions.

(4) Subject to the foregoing, the complaints  
are dismissed.

  
\_\_\_\_\_  
J.F.W. Weatherill  
Chairman

  
\_\_\_\_\_  
Calvin Davis  
Member of the Board

  
\_\_\_\_\_  
J.-Jacques Alary  
Member of the Board

ISSUED AT OTTAWA, this 8th day of April, 1991.

CLRB/CCRT - 865

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## SUMMARY

CANADIAN PACIFIC LIMITED, APPLICANT, AND NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA ET AL., RESPONDENTS.

Board Files: 530-1848

Decision No.: 866

## RÉSUMÉ

CANADIEN PACIFIQUE LIMITÉE, REQUÉRANT, AINSI QUE LE SYNDICAT NATIONAL DES TRAVAILLEURS ET TRAVAILLEUSES DE L'AUTOMOBILE, DE L'AÉROSPATIALE ET DE L'OUTILLAGE AGRICOLE DU CANADA ET AUTRES, INTIMÉS.

Dossiers du Conseil : 530-1848

Décision n° : 866

The applicant in this matter seeks a review, pursuant to section 18 of the Code, of the bargaining units currently established in respect of its shopcraft employees. This interlocutory decision deals with a number of preliminary objections.

The first three objections raised by counsel for each of the respondents are the same which were put forward in Canadian National Railway Company (1991), as yet unreported CLRB decision no. 845. The Board adopts the reasoning set out in that decision and dismisses the three objections.

Mr. Rosner raised another preliminary objection to the application; he argues that, if granted, it would constitute a violation of the freedom of association protected by the Canadian Charter of Rights and Freedoms. The Board dismisses this objection because it is of the view that freedom of association cannot reasonably be read as implying a right to dissociate oneself, or to exclude others from, any group in which one might be included. On the contrary, the Board considers that the Code creates a collective bargaining system which promotes freedom of association.

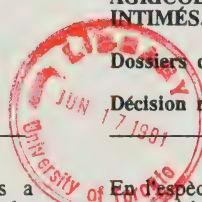
Counsel for CAW requests an adjournment of the hearing of the application until such time as the employees themselves realize the advantage of a single bargaining unit. The Board is not of the view that the hearing should be postponed for that reason since the wishes of employees with respect to the description of a bargaining unit are only one of the factors to be considered by the Board in the context of the application, and not a decisive one.

En l'espèce, le requérant tente d'obtenir une révision, aux termes de l'article 18 du Code, des unités de négociation actuelles englobant ses employés de métiers d'ateliers. La décision interlocutoire traite d'un certain nombre d'objections préliminaires.

Les trois premières objections soulevées par l'avocat de chacun des intimés sont les mêmes que celles qui ont été soulevées dans Compagnie de chemins de fer nationaux du Canada (1991), décision du CCRT n° 845, non encore rapportée. Le Conseil accepte le raisonnement formulé dans cette décision et rejette les trois objections.

M. Rosner a soulevé une autre objection préliminaire; il prétend qu'agréer la demande constituerait une atteinte à la liberté d'association protégée par la Charte canadienne des droits et libertés. Le Conseil rejette cette objection parce que, à son avis, la liberté d'association ne peut raisonnablement être interprétée comme un droit de non-association ou d'exclusion d'un groupe dont une personne peut faire partie. Au contraire, le Conseil estime que le Code crée un régime de négociation collective qui favorise la liberté d'association.

L'avocat de TCA demande un ajournement de l'audience portant sur la demande jusqu'à ce que les employés eux-mêmes puissent se rendre compte des avantages d'une seule unité de négociation. Le Conseil ne croit pas qu'il y a lieu de reporter l'audience pour cette raison parce que les désirs des employés concernant la description d'une unité de négociation ne sont que l'un des facteurs dont doit tenir compte le Conseil lorsqu'il tranche une demande, mais non le facteur déterminant.



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Reasons for decision

Canadian Pacific Limited,  
*applicant,*

*and*

National Automobile, Aerospace  
and Agricultural Implement  
Workers Union et al.,

*respondents.*

Board File: 530-1848

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The Board was composed of Mr. J.F.W. Weatherill,  
Chairman, and Ms. Ginette Gosselin and Mr. Michael Eayrs.

Appearances:

Mr. M. Shannon, for the Canadian Pacific Limited (CP);  
Mr. S. Waller for the Canadian Automobile Workers (CAW),  
respondent;

Mr. J. Shields for the International Association of  
Machinists and Aerospace Workers (IAM), respondent;

Mr. F. Côté for the International Brotherhood of  
Electrical Workers (IBEW), respondent;

Mr. M. Church for the United Association of Journeymen  
and Apprentices of the Plumbing and Pipe Fitting Industry  
of the United States and Canada (UA), International  
Brotherhood of Boilermakers, Iron Ship Builders,  
Blacksmiths, Forgers and Helpers (BBF), Sheet Metal  
Workers' International Association (SMW) and  
International Brotherhood of Firemen and Oilers (IBFO);  
Mr. A. Rosner, intervenor.

This matter was heard at Montréal on March 12, 1991.

These reasons for decision were written by Mr. J.F.W.  
Weatherill, Chairman.

## INTERLOCUTORY DECISIONS

The applicant in this matter seeks a review, pursuant to section 18 of the Code, of the bargaining units currently established in respect of its shopcraft employees. A number of preliminary objections have been raised. These objections were addressed at the hearing on March 12, and the Board's decision thereon is set out herein.

Counsel for each of the respondents raised the same objections which were put forward in Canadian National Railway Company (1991), as yet unreported CLRB decision no. 845. The parties were content, however, to adopt the positions which had been put forward in that case, without repeating the arguments then made. This panel adopts the reasoning set out in decision no. 845, and dismisses those objections with respect to this case. That is, we consider: (1), that the instant application, if successful, would not involve any violation of the right of freedom of association enshrined in the Code or in ILO Convention No. 87; (2), that the application is "timely" as that expression was used in decision no. 845; and (3) that the application does allege circumstances which the Board might consider to constitute a "prima facie" case for review.

In the instant case, two further preliminary matters were raised, and we will now deal with these in the order in which they were presented.

Mr. Rosner, on his own behalf as an intervenor (and not in his capacity as co-counsel on behalf of certain of the shopcraft unions), contended that the application should

be dismissed, since to grant it would, so he argued, entail a violation of a fundamental freedom enshrined in the Canadian Charter of Rights and Freedoms. This is an argument which was not advanced in decision no. 845.

The material provision of the Charter is section 2, which reads as follows:

*"2. Everyone has the following fundamental freedoms:*

- (a) freedom of conscience and religion;*
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*
- (c) freedom of peaceful assembly; and*
- (d) freedom of association."*

It was Mr. Rosner's contention that the determination by this Board of a unit of employees appropriate for collective bargaining involved an interference with the employees' freedom of association which freedom includes, so Mr. Rosner argued, a right not to associate. As he put it, "it would force me to be associated in a bargaining unit with certain individuals or classes of employees with whom I don't consider I share common aims." It may be noted that this argument would apply with equal force to the existing bargaining units, some of which Mr. Rosner represents in his other capacity.

Mr. Rosner argued that distinctions must be drawn between freedom of association, freedom of affiliation and freedom of representation. Certainly, these terms have different referents (and, in each case, different levels of reference), and different connotations, although in ordinary usage these distinctions may often be blurred. Freedom of association may indeed include, at the level of personal relationships, a freedom to dissociate or

even to exclude from association. In the workplace, while an individual may be free to accept employment, where employment is offered, the concept of freedom of association must then be understood in a workplace context: the individual is free to "associate", in the sense of "be friends with" or "chum around with" whomever he likes (or whoever will have him), but is not free to refuse any proper association (in the workplace context) with other employees. This is so whether one rejects association on perfectly understandable grounds such as dislike, or on unacceptable grounds such as religious or racial prejudice. Mr. Rosner did not argue - although it would follow from his argument, in our view - that human rights legislation, which interferes with a right "not to associate" in certain contexts, violates the Charter, although he would no doubt consider such legislation as establishing "reasonable limits ... demonstrably justified in a free and democratic society", and thus protected by section 1 of the Charter.

The Canada Labour Code, in section 8(1), provides that

*"8.1(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities."*

This freedom is, in our view, a form of freedom of association, given particular expression in the Code. The Code goes on to make provision for a collective bargaining regime. Under the Code, collective bargaining is carried on by bargaining agents (trade unions) found to be representative (on a majority basis) of employees in the bargaining unit determined by an independent agency (the Board) to be appropriate for collective bargaining. When a trade union is certified as

bargaining agent, the employer is obliged by law to bargain in good faith with that agent. This is no doubt considered by some employers to impinge on their freedom of association, but we do not understand Mr. Rosner to object to that.

"Freedom of association", in our view, cannot reasonably be read as implying an absolute right to dissociate oneself, or to exclude others from, any group or class in which one might be included. Another way of expressing this point might be to say that other members of a group or class to which one might belong are not necessarily one's "associates" within the meaning of the Charter. There are many forms of "association" within a free and democratic society with respect to which the application of the notion of "freedom of association" is simply not apposite. Thus, legislative bodies at the federal, provincial and municipal levels are composed of representatives, elected on a majority (or plurality) basis for constituencies whose boundaries are determined by independent commissions. As residents of a constituency, citizens might be said, on Mr. Rosner's argument, to be "associated" with one another - and election results might be expected to reveal that these "associates" do not "share common aims"! Being designated as a resident of a political constituency, however, is not, in our view, an infringement of the right of freedom of association enshrined in the Charter. In the same way, we do not consider that the determination of a unit of employees appropriate for collective bargaining infringes on the freedom of association of the members of that unit. On the contrary, we consider that the collective bargaining

system established under the Code, where bargaining agents are elected on a majority basis as the exclusive bargaining agents for employees in an independently defined bargaining unit, makes freedom of association more meaningful, in the area of industrial relations, than it would otherwise be.

In the NSNU, Devco Local v. Canada Labour Relations Board (1989), 58 D.L.R. (4th) 225; and 98 N.R. 119, where the Board had revoked the certification of a trade union representing a particular group of employees, and had certified another trade union in respect of a much larger bargaining unit now incorporating that group, the Federal Court of Appeal found that there had been no infringement of the freedoms protected under the Charter. While the same arguments would not appear to have been made in that case as were made here, it is our view that the decision in that case is, with respect, determinative.

For the foregoing reasons, Mr. Rosner's objection is dismissed.

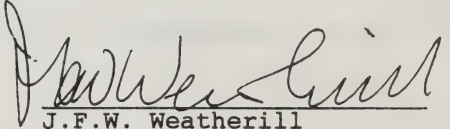
Mr. Waller, on behalf of the Canadian Automobile Workers, urged that the Board postpone the hearing of this application indefinitely. It was his submission that while the one bargaining unit sought by the employer was appropriate for collective bargaining and that the employees would benefit therefrom, the Board and the parties ought to wait until such time as the employees themselves understood the benefits of one unit.

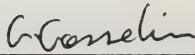
The other respondents did not share the view that a single bargaining unit was appropriate. Mr. Shields disagreed that the passage of time would lead to any altered view on the part of employees. Mr. Côté, while not supporting Mr. Waller's objection, suggested that the Board give some guidance to the parties in respect of what might be considered an appropriate unit, and that the parties then be allowed time to adjust. Mr. Church supported Mr. Côté's suggestion, and also Mr. Waller's objection, although not on the ground that one unit was appropriate.

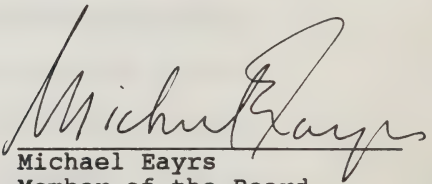
In our view, these proceedings ought not to be adjourned. The wishes of employees with respect to the description of a bargaining unit are but one of the factors, and not a decisive one, to be considered in the determination of an appropriate unit. Employees might or might not come to the realization to which Mr. Waller expects they would come, and we think it unfair to the applicant to defer, on this speculative ground, the hearing of the evidence on which it relies. It may be noted that while notice of this application was posted, only an extremely small number of employee interventions was received. We are of course sympathetic to the suggestion made by Mr. Côté and supported by Mr. Church, but it must be remembered that the matter of the determination of the appropriate bargaining unit is a contested one, and it would not be proper for the Board to indicate its views before the evidence on which these views will be based has been heard and considered. While some general policy indications may appear from the Board's previous decisions, it has always been our view that each case is

to be determined on its own merits. This is particularly so in the case of the large, complex and historically particular groups which are involved in this case. For these reasons, Mr. Waller's objection is dismissed.

Accordingly, the preliminary objections are dismissed. The Board will proceed with the hearings into this matter, as scheduled.

  
J.F.W. Weatherill  
Chairman

  
Ginette Gosselin  
Member of the Board

  
Michael Eayrs  
Member of the Board

DATED at Ottawa this 11th day of April 1991.

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## SUMMARY

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1843, APPLICANT, AND HALIFAX GRAIN ELEVATOR LIMITED, HALIFAX, NOVA SCOTIA, EMPLOYER, AND THE HALIFAX PORT CORPORATION, MIS-EN-CAUSE EMPLOYER.

Board Files: 555-3252  
(585-420)

Decision no.: 867

Canada Labour Code (Part I - Industrial Relations). Interim decision (section 20). Application for certification (section 24 et seq). Dismissed on the grounds of redundancy following a sale of business. Finding of the sale of business on the Board's own motion (sections 44 and 46). Criteria for application. Existing certification to be amended under section 18. Previous employer added as party to proceedings (section 16(o)).

The International Longshoremen's Association (the ILA) was certified in 1958 for a group of grain elevator employees working for the Halifax Port Corporation (the Port). In 1985, the Port leased the elevator to Halifax Grain Elevator Ltd. (HGEL) who took over the operation. All the elevator employees moved on to HGEL. The Port's certification was never amended. No application seeking a declaration of sale of business was filed, and HGEL voluntarily recognized the union. In 1990 the same union applied to be certified at HGEL for the same elevator group.

The Board considered the test governing the application of

## RÉSUMÉ

ASSOCIATION INTERNATIONALE DES DÉBARDEURS, SECTION LOCALE 1843, REQUÉRANTE, ET HALIFAX GRAIN ELEVATOR LIMITED, HALIFAX (NOUVELLE-ÉCOSSE), EMPLOYEUR, ET SOCIÉTÉ DU PORT DE HALIFAX, EMPLOYEUR MIS EN CAUSE.

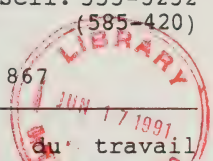
Dossiers du Conseil: 555-3252  
(585-420)

Décision n°: 867

Code canadien du travail (Partie I - Relations du travail). Décision partielle (article 20). Demande d'accréditation (article 24ss). Rejetée parce qu'elle est inutile en raison d'une vente d'entreprise. Déclaration de vente d'entreprise (articles 44 et 46) faite proprio motu. Critères d'application. Accréditation existante doit être modifiée en vertu de l'article 18. Ancien employeur mis en cause par le Conseil (alinéa 16o)).

L'Association internationale des débardeurs (AID) a été accréditée en 1958 pour représenter les employés du silo exploité par la Société du port d'Halifax (le port). En 1985, le port a cédé à long terme l'exploitation du silo à la Halifax Grain Elevator Ltd. (HGEL). Tous les employés du silo sont passés chez HGEL. L'accréditation accordée pour le port n'a jamais été modifiée. Aucune demande en vue d'obtenir une déclaration de vente d'entreprise n'a été présentée et HGEL a reconnu volontairement le syndicat. En 1990, le même syndicat demande à être accrédité auprès de HGEL pour le groupe du silo.

Le Conseil a passé en revue les critères donnant



section 44 (sale of business). The evidence establishes that all the criteria were met and that there had been a sale. Section 44 applies automatically, contrary to section 45 which requires an application by a union. Reasons and effects discussed. The certification issued for the Port automatically moved on to HGEL at the time of the sale. This renders the application for certification moot and redundant.

The Board further decided to use its power under section 18 to amend the existing certification order. To this end, the Board added the Port Corporation as an interested party, pursuant to section 16(o) and suspended the issuance of amended certificates, pursuant to section 20.

ouverture à l'article 44 (vente d'entreprise). La preuve révèle que tous les critères étaient réunis et qu'il y avait eu vente. L'article 44 s'applique de plein droit, contrairement à l'article 45 qui exige la présentation d'une demande par un syndicat. Raisons et conséquences discutées. L'accréditation accordée pour le port est passée automatiquement chez HGEL par l'effet de la vente. La demande d'accréditation est en conséquence inutile.

En outre, le Conseil a décidé qu'il y avait lieu de modifier le certificat d'accréditation existant en utilisant le pouvoir de révision conféré par l'article 18. A cette fin il a décidé de mettre en cause la Société du port, aux termes de l'alinéa 16o), et de suspendre la délivrance de certificats modifiés, selon l'article 20.

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Reasons for decision

International Longshoremen's  
Association, Local 1843,

*applicant,*

*and*

Halifax Grain Elevator Limited,  
Halifax, Nova Scotia,

*employer,*

*and*

The Halifax Port Corporation,

*mis-en-cause employer.*

Board Files: 555-3252  
(585-420)

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The Board was composed of Mr. Serge Brault, Vice-Chairman,  
and Ms. Evelyn Bourassa and Mr. Robert Cadieux, Members.

Appearances:

Mr. Carl Haley, President, International Longshoremen's  
Association, Local 1843, for the applicant; and

Mr. John E. Oakley, President, Halifax Grain Elevator  
Limited, for the employer.

These reasons for decision were written by Mr. Serge  
Brault, Vice-Chairman.

I

The Application

This case deals with an application for certification  
filed on December 6, 1990, pursuant to section 24 of the  
Canada Labour Code (Part I - Industrial Relations) by the  
International Longshoremen's Association, Local 1843 (ILA  
or the union) to represent a group of employees of Halifax  
Grain Elevator Limited (HGEL or the employer) involved in

the operation of the Halifax grain elevator located in the port of Halifax. Section 24(2) reads as follows:

*"24.(2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made*

*(a) where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time;*

*(b) where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;*

*(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; ..."*

This application was not served on the Halifax Port Corporation (the Port), who was the original employer of the unit sought here. Be that as it may, neither the union nor the employer currently sought has questioned the accuracy of the labour relations officer's report filed with the Board.

Since this application is not being contested, the Board did not deem it necessary to hold a hearing; it could dispose of the application on the basis of its officer's report and the parties' submissions. Given the nature of our findings, we nonetheless considered that the issuance of formal reasons for decision was warranted.

II

The Background

The ILA was certified back in 1958 to represent the employees sought here. At the time, they were employed by the Halifax Port Corporation - a situation that lasted until late 1985. Earlier in 1985, that certification was updated at the request of the union and it still reads as follows (Board file no. 530-1198):

*"all employees of the Halifax Port Corporation, Nova Scotia, working at the Port of Halifax, excluding:*

- port general manager
- secretary/administrative assistant to the port general manager
- director of finance
- director of engineering
- director of operations
- director, port planning and marketing
- director, personnel and industrial relations
- director and superintendent, police and security
- inspector, operations (police and security)
- lieutenant, police and security
- personnel assistant
- harbour master
- manager, grain operations
- manager, engineering maintenance
- manager, systems and financial planning
- manager, accounting
- secretary to the director and superintendent (police and security)
- secretary/clerk (personnel and industrial relations)

*and excluding white collar and other employees covered by other bargaining certificates issued by the Canada Labour Relations Board."*

Following his investigation into this application, the Board's senior labour relations officer assigned to the case summarized its factual background:

*"5. Background Information*

*On March 31, 1958, the Board certified International Longshoremen's Association, Independent, as bargaining agent for a unit of employees of National Harbours Board comprising certain employees at the Port of Halifax, Nova*

Scotia (Board File No. 766-835). A copy of the certification order is attached and marked 'Attachment 1'. Due to an error in the wording of the certificate, the Board issued a letter dated April 10, 1958, amending the order ('Attachment 2'). Subsequently, the National Harbours Board was reorganized and the employer of employees in this unit became the Halifax Port Corporation. Also, International Longshoremen's Association, Independent, became International Longshoremen's Association, Local 1843 (hereinafter referred to as 'ILA Local 1843'). On February 20, 1985, ILA Local 1843 made a review application to the Board to update the certificate and redefine the bargaining unit in general or universal terms. The Board granted the application on September 27, 1985 (Board File No. 530-1198). A copy of the order is attached and marked 'Attachment 3'. At the time, the Halifax Port Corporation owned and operated grain elevators in the Port of Halifax and most of the employees working at the elevators formed part of the above-noted bargaining unit, along with other employees in the Port.

In October 1985, Nosco Marine Industries Inc. (hereinafter referred to as 'Nosco') entered into a long-term lease with the Halifax Port Corporation for the operation of the grain elevators in the Port of Halifax. Nosco honoured the terms of the existing collective agreement in as far as it was applicable to the grain elevator employees and gave ILA Local 1843 voluntary recognition as bargaining agent for the grain elevator employees. Subsequently, Nosco changed its name to HGEL and ILA Local 1843 and HGEL are currently party to a collective agreement covering the grain elevator bargaining unit."

The collective agreement in question expired in 1989.

### III

#### The Sale of Business Issue

Even if the parties do not, the facts of this case raise the issue of the applicability of the provisions of the Code dealing with the sale of business (sections 44 to 46).

Section 44 reads as follows:

"44.(1) In this section and sections 45 and 46,

'business' means any federal work, undertaking or business and any part thereof;

'sell', in relation to a business, includes the lease, transfer and other disposition of the business.

(2) Subject to subsections 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent."

Analyzing the Quebec legislation, Justice Beetz of the Supreme Court had the following to say about the proper way to proceed when considering the issue of a sale of business:

"... the undertaking becomes the most important component of [the] framework postulated by the legislator: continuity of the undertaking is the essential condition... The interpretation... must therefore be approached through the definition of an 'undertaking'."

(U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, page 1103; emphasis added)

Given Justice Beetz was discussing the Quebec law, the method he suggests is no doubt even more justified where, as it is our case, the Board's very jurisdiction to even entertain other issues - such as the occurrence of a sale

or transfer - is dependent upon the buyer as well as the seller being federal undertakings. (See Canada Post Corporation and Shoppers Drug Mart Limited (1987), 71 D.T.R. 103; 1 CLRB (2d) 218; and 87 CLC 16,049 (CLRB no. 649), upheld by the Federal Court of Appeal, Canada Post Corporation and Canadian Union of Postal workers et al., no. A-762-87, January 28, 1988 (F.C.A.).)

For the Board to find that a sale of business has occurred, it must answer four questions, logically, in the following order:

1. Is the alleged buyer indeed operating a federal business or "going concern"?
2. Was the alleged seller indeed operating or otherwise controlling as his own that said federal "going concern" in whole or in part before the sale took place?
3. Were union bargaining rights in some way tied to the seller's business or part thereof that was presumably sold?
4. Has there been an actual sale or transfer of that same business or part thereof to the buyer?

What the definition of business found in section 44 does is for the most part to refer us back to section 2(h) of the Code, adding that a part of such a federal business will also be considered as the whole under sections 44 et seq. For the rest, section 44 does not expand on the actual contents of the notion of business or undertaking.

Let us now apply the four-prong test set out above to the instant case. First, the business of the alleged buyer, HGEL. No one challenges the fact that operating a grain elevator is indeed operating a federal business or "going concern" pursuant to section 2(h) of the Code (see Canada Grain Act, R.S.C., 1985, c. G-10). (See Canada Labour Relations Board et al. v. City of Yellowknife, [1977] 2 S.C.R. 729; and Northern Telecom Limited and Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 28 N.R. 107, pages 132; 13; and 124-125.) Consequently, there should be no doubt that for HGEL to run such a federal installation or business is by the same token indeed to run a "business" for the purpose of section 44 et seq. (see U.E.S., Local 298 v. Bibeault, *supra*).

Secondly, the business of the seller. The Halifax Port Corporation used to run that same elevator as part of its overall federal business or "going concern." Now, since the Port only leased part of its installations to HGEL, specifically the elevator, that elevator would qualify as having been "part" of the Port's overall business pursuant to section 44(1). And, as such, the elevator was a separate, severable and cohesive component of the overall business of the Port, a "going concern" in itself, as opposed to an unmeaningful collection of assets (Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402)).

Thirdly, the issue of union rights. That elevator was specifically referred to in the certification issued in 1958 to the ILA and later reviewed in 1985. This being so, the ILA can indeed be qualified as having been "the bargaining agent for the employees employed in the

business" presumably "sold" by the Port, the whole pursuant to section 44(2)(a).

Fourthly, the sale or transfer. The elevator was leased to HGEL (then known as Nosco) on a long-term basis in 1985. Such a mode of disposition is specifically referred to in the definition of "sell" in section 44(1). Hence, that elevator is deemed to have been sold pursuant to that provision.

Given our answer to the four questions set out before, all the conditions for a finding of sale of business are met.

Yet, no application to that effect has been made.

The Interpretation Act, R.S.C., 1985, c. I-23, provides as follows:

*"10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning."*

Thus, under the Code, section 44 operates automatically, contrary to section 45 which requires an application. The fact that a party fails to file an application under section 44 or is prevented from doing so is not a bar to such a determination in the future. The Board cannot ignore nor the parties escape the consequences of a sale of business when the evidence establishes that a sale has occurred.

Further, section 46 of the Code reads:

*"46. Where any question arises under section 44 or 45 as to whether or not a business has been sold or as to the identity of the purchaser of a business, the Board shall determine the question."*

As evidenced in Board case law, a finding of sale may be made years after the actual fact when proof is actually adduced before the Board establishing its occurrence (see Bradley Services Ltd. (1986), 65 di 111; 13 CLRBR (NS) 256; and 86 CLLC 16,036 (CLRB no. 570)).

In the instant case, the employees and the union did not apparently suffer any ill effects following the lease to HGEL, and indeed the ILA obtained voluntary recognition. This probably explains why the union would not have seen any immediate interest in seeking to preserve its certification. Yet they applied for certification a few years later.

Although this question may seem academic to some, on analysis, the issue of the sale is essential to the Board's final determination, not only from a legal but also from a labour relations point of view. For instance, in a certification the open period under section 24 will vary depending on whether or not the incumbent union is certified. Under section 44, union support is not an issue. It always is in a certification.

We may wonder whether the ILA would not have submitted that different rules apply to this application had it been made by a rival union intent on displacing the ILA. Is it not likely that the ILA would have argued that it was already certified as opposed to voluntarily recognized depending on the effect the argument could have had on the outcome? When faced with the same facts, the Board cannot

apply different rules. For instance, the open period should not vary on the basis of the applicant's identity. Yet this is what ignoring the consequence of an actual sale of business could lead to.

What this all boils down to is that the ILA's view that it is merely voluntarily recognized is erroneous. The fact of the matter is that under the Code, it is already certified and HGEL already bound by the certification. This being so, the ILA's application being redundant and moot, it is hereby dismissed.

#### IV

Although the ILA's application for certification is dismissed, the Board's file indicates that the current wording of its certification order needs to be reviewed so as to correctly reflect the effects of that partial sale of business between HGEL and the Port Corporation. The Board has the authority to review on its own motion the orders it previously issued (see Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRBR no. 383), Board decision upheld by the Federal Court of Appeal, Re Latrémouille and Canada Labour Relations Board et al. (1985), 17 D.L.R. (4th) 709; see also Canada Post Corporation v. The Canadian Union of Postal Workers et al., no. A-307-87, September 8, 1987 (F.C.A.)). Section 18 provides as follows:

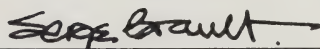
*"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."*

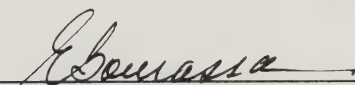
As mentioned earlier, since the Port was not made party to these proceedings, the Board hereby orders that it be,

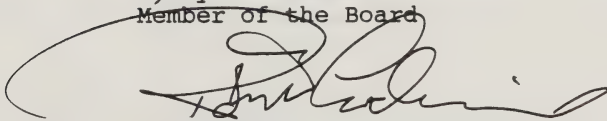
pursuant to section 16(o) of the Code. The Board's Registrar in Halifax shall serve forthwith upon the Port Corporation a copy of the whole file.

The Port, as well as the other parties, will have 30 days from the date of this decision to make whatever submissions on the description of the certificates to be issued to reflect their current factual situation.

The Board hereby suspends the issuance of formal certificates until after it has considered all parties' submissions. This is an interim decision pursuant to section 20 of the Code.

  
\_\_\_\_\_  
Serge Brault  
Vice-Chairman

  
\_\_\_\_\_  
Evelyn Bourassa  
Member of the Board

  
\_\_\_\_\_  
Robert Cadieux  
Member of the Board

ISSUED at Ottawa, this 11th day of April 1991.

CLRB/CCRT - 867



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## Summary

RON DUMONT, EMPLOYEE; CANADIAN  
NATIONAL RAILWAY COMPANY, EMPLOYER;  
AND BROTHERHOOD OF LOCOMOTIVE  
ENGINEERS, BARGAINING AGENT.

Board File: 950-169

Decision No.: 868

These reasons deal with a referral of a safety officer's decision to the Board pursuant to section 129(5) of Part II of the Canada Labour Code (Occupational Health and Safety). The circumstances giving rise to the referral occurred on the night of November 15, 1990 when Ron Dumont and two other crew members refused to operate a train which included two chlorine tank cars through a built-up area of Metropolitan Vancouver because of their concerns of danger to themselves and to other employees who may have been working in the vicinity. Following an investigation, a safety officer from Transport Canada ruled that in the circumstances danger within the meaning of the Code did not exist.

The Board upheld the safety officer's decision.

In its reasons the Board criticizes the system where safety and health matters are dealt with in a quasi-judicial forum and suggests alternate ways for dealing with these important questions of whether danger exists in the workplace.

As for the specific circumstances of this referral, the Board found that the train in question was properly equipped and that the movement of the train was to have been done within the regulatory scheme and the standards set by the Railway Safety Branch of Transport Canada whose people are highly skilled and knowledgeable in the area of railway operations and safety. The Board was satisfied that the safety officer had ensured that all those standards had been met.

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juridiques.

## Résumé de Décision

RON DUMONT, EMPLOYÉ; COMPAGNIE DES  
CHEMINS DE FER NATIONAUX DU CANADA,  
EMPLOYEUR; ET FRATERNITÉ DES  
INGÉNIEURS DE LOCOMOTIVES, AGENT  
NÉGOCIATEUR.

Dossier du Conseil: 950-169

N° de Décision: 868

Les présents motifs traitent d'un renvoi au Conseil d'une décision d'un agent de sécurité fondée sur le paragraphe 129(5) du Code canadien du travail (Partie II - Santé et sécurité au travail). Les événements qui ont donné lieu au renvoi se sont produits dans la soirée du 15 novembre 1990 lorsque Ron Dumont et deux autres membres de l'équipe ont refusé de faire passer un train, qui comprenait, entre autres, deux wagons de réservoirs de chlore, dans une zone bâtie du Vancouver métropolitain parce qu'ils craignaient qu'il y ait danger pour eux-mêmes et pour d'autres employés qui auraient pu travailler dans les environs. À la suite d'une enquête, un agent de sécurité de Transports Canada a décidé que, dans les circonstances, il n'y avait pas danger au sens du Code.

Le Conseil a maintenu la décision de l'agent de sécurité.

Dans ses motifs, le Conseil désapprouve le système selon lequel les affaires relatives à la santé et à la sécurité sont traitées devant un forum quasi judiciaire et suggère d'autres façons de s'occuper de ces questions importantes de savoir si un danger existe dans le lieu de travail.

En ce qui a trait aux circonstances précises du renvoi, le Conseil juge que le train en cause était équipé de façon adéquate et que le déplacement du train devait avoir lieu selon les normes et règlements établis par la Direction de la sécurité ferroviaire de Transports Canada, dont les employés sont hautement spécialisés et possèdent toutes les connaissances requises dans le domaine de l'exploitation ferroviaire et de la sécurité. Le Conseil est convaincu

que l'agent de sécurité s'est assuré  
que toutes ces normes avaient été  
respectées.

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Reasons for decision

Ron Dumont,  
*employee,*  
Canadian National Railway  
Company,  
*employer,*  
and  
Brotherhood of Locomotive  
Engineers,  
*bargaining agent.*  
Board File: 950-169

---

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Ms. Shona A. Moore, for Ron Dumont and the Brotherhood of Locomotive Engineers; and  
Mr. Duncan M. MacPhail and Ms. Annabelle Donovan, for Canadian National Railway Company.

The reasons for this decision were written by Mr. Hugh R. Jamieson, Vice-Chair.

I

This is a referral of a safety officer's decision under section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or

*operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."*

The referral came about after a safety officer had ruled that danger did not exist within the meaning of the Code when Mr. Ron Dumont and two other train crew members, Messrs. Brennan Barr and Brent Stumph, refused to operate a train containing two cars of chlorine through a built-up area of Metropolitan Vancouver because of their concern that these two cars had not been physically examined by a qualified car inspector. Mr. Ron Dumont disputed the safety officer's finding and asked that the matter be referred to the Board.

The refusal took place late at night on November 15, 1990 when Mr. Dumont, who is employed as a locomotive engineer by Canadian National Railway Company (CN or the employer), and the other two crew members were assigned to move a train from Lynn Creek Yard to Sapperton, a distance of some 15 miles. The route they would have taken runs from North Vancouver, across the 2nd Narrows Bridge, through the Thornton Tunnel, past Willingdon Junction and along the CNR/Burlington Northern Track through Burnaby to Sapperton. The train in question was made up of 45 cars, 42 of which were empty and three loaded. Two of the loaded cars were placarded "SPECIAL DANGEROUS" as they contained chlorine. Following the refusal, safety officer Allan Bartlett of Transport Canada attended at the site at about 3:00 a.m. on November 16th where he conducted an investigation into the circumstances and rendered a verbal decision that danger did not exist. Mr. Dumont et al then moved the train as originally assigned and completed the trip without incident.

On November 20, 1990, safety officer Bartlett issued the following confirmation of his verbal ruling:

"SUBJECT: CN RAIL EMPLOYEE'S REFUSAL TO WORK IN ACCORDANCE WITH SECTION 128(1)(a) and (b) CANADA LABOUR CODE 2000 HOURS, 15 NOVEMBER 1990 AT LYNN CREEK YARD, CN VANCOUVER TERMINAL

Gentlemen:

This letter confirms my verbal decision of 16 November 1990 with respect to Messrs. Dumont, Barr and Stumph's refusal to work on a transfer ordered at Lynn Creek Yard for 1559 hours, 15 November 1990.

The transfer consisted of diesel units 5310-5325-5309 with 3 loads - 42 empties - 1636 tons - 2665 feet in length; including loaded chlorine cars ACFX 85456 and ACFX 85431 placarded Special Dangerous, and was made up on Yard Track NF 53.

You each stated that your refusal to work was based on your belief that the two loaded cars containing chlorine were unsafe to be moved in a transfer to Sapperton, because they had not been physically examined by a qualified car inspector at Lynn Creek.

Section 122(1) of the Canada Labour Code defines **DANGER** as:

**DANGER:** means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.

The danger must be immediate, and real, and one that is intended to be covered under the code, therefore within the spirit of the Code, it becomes clear why danger is defined as such.

My determination in this instance of your 'Refusal to Work' is that the two loaded cars of chlorine, ACFX 85456 and ACFX 85431 were moved from Track N230 - Canadian Occidental Petroleums to Track NF 53. The yard crew assignment which moved these cars were required to comply with the Dangerous Goods special instructions contained in Timetable No. 12 - issued May 27, 1990 Page 148, Section 05.0 - Inspection which reads:

#### 5.1 LIFTING CARS

Before lifting placarded cars from the shippers' tracks, from interchange tracks or while enroute, train and yard crews must inspect such cars in accordance with Schedule 'A' of R.T.C. R-37253, as outlined in 'General Operating Instructions', Form 696, Section 2.0. Defective cars must not be lifted until all exceptions have been corrected.

#### 5.4 DEFECTIVE BRAKES

Dangerous goods cars must have air and hand brakes in proper condition for service when lifted from shippers' tracks.

Form 696 - Section 2.35 - Rule 111(2).

At each location where a freight car is placed in a train and a certified car inspector is not on duty for the purpose of inspecting freight cars, the freight car shall, as a minimum requirement, be inspected for these hazardous conditions:

- (a) (I) car body leaning or listing to the side,  
(II) car body sagging downward,  
(III) car body positioned improperly on the truck,  
(IV) object dragging below the car body,  
(V) object extending from the side of the car body,  
(VI) door securely attached,  
(VII) broken or missing safety appliance, or  
(VIII) lading leaking from a placarded dangerous commodity car
- (b) insecure coupling;
- (c) overheated wheel or journal;
- (d) broken or extensively cracked wheel;
- (e) brake that fails to release; and
- (f) any other apparent safety hazard likely to cause an accident or casualty before the train arrives at its destination

When a hazardous condition is found that may affect the safe operation of the train or the safety of employees, the person in charge of the train shall take the appropriate action to minimize or eliminate any potential danger by:

- (a) correcting the condition,
- (b) reducing the speed of the train,
- (c) removing the defective car from the train, or
- (d) taking such other action as is necessary to ensure the continuous safe operation of the train and the safety of employees.  
(R.T.C. Order R-37253.)

My investigation into the handling of these cars indicated conclusively that the procedures outlined above were properly complied with, and that no defects were present on these cars which would have prevented their safe movement on the transfer to Sapperton. The conditions inferred by Messrs. Dumont, Barr and Stumph under Section 128(1)(a) and (b) of the Canada Labour Code, were without foundation and therefore did not constitute a danger on 15 November 1990.

You are hereby made aware of your right to referral under Section 129(5) and the employer of their responsibility under Section 147 of the Canada Labour Code.

Yours sincerely,  
(signed)

A.E. Bartlett  
Safety Officer # 2510"

Mr. Dumont received the foregoing decision on November 29, 1990. His letter requesting the referral to the Board was dated December 2, 1990. The reference came to the Board by way of a letter from Mr. Bartlett dated December 19, 1990 which was received by the Board on December 24, 1990. Initially, the referral was set down to be heard at Vancouver on January 21, 1991, however, when the parties appeared before Member Calvin B. Davis who was sitting as a single Member quorum on that date pursuant to section 156(1) of the Code, counsel had only just been retained by the Brotherhood of Locomotive Engineers (BLE) on Mr. Dumont's behalf. The matter was adjourned at counsel's request until March 4, 1991 which was a mutually agreed upon date.

In the meantime, another referral came to the Board under section 129(5) of the Code which raised the same type of concerns and affected the same parties at the Vancouver Terminals. This second referral, by Mr. Garry Lloyd Ager, (Board file 950-173) was scheduled to be heard in conjunction with the Dumont referral and the panel of the Board was increased to the instant three person quorum. As it turned out, Mr. Ager could not be present during the time set aside, therefore, the Board proceeded with the Dumont referral which was heard on March 5, 6 and 7, 1991.

## II

The Board's powers to deal with a referral such as this are contained in section 130(1) of the Code:

*"130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*

*(a) confirm the decision; or*

*(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."*

(emphasis added)

Before we exercise these powers, we feel obliged to say a few words about this whole process where the Board has been charged with deciding whether employees are in danger while at work. When these references of safety officers' decisions to the Board first appeared in the Code in 1978, there was an acute awareness amongst those of us who were with the Board at the time of the need for an entirely different approach to determinations of whether danger exists in a workplace, as compared with how labour relations cases are normally heard and determined. The very wording of Part II of the Code (previously Part IV), by the use of such terms as "reference" rather than "appeal" and, "without delay and in a summary way, inquire into the circumstances..." as opposed to "hear and determine", indicates an expectation by the legislators for a much less formal approach than existed prior to the Board becoming involved, when safety officers' directions were appealable to a magistrate.

The whole thrust of Part II of the Code is clearly to have safety and health problems resolved through informed, co-operative diagnoses and consultation in a non-adversarial atmosphere. In keeping with the spirit of the legislation the Board approached its task from the premise that safety and health issues are not negotiable. The adversarial nature of our collective bargaining system with its give and take according to prevailing strengths is no place for the resolution of such issues. Safety and health should not have

to be compromised nor should they be traded to achieve other labour relations goals. Conversely, the right to refuse under Part II ought not to be abused by using it as a tool to further other labour relations causes.

With these thoughts in mind, the Board set about its task by attempting to create a non-adversarial atmosphere for references under Part II by de-formalizing its procedures. Rather than formal hearings in quasi-judicial settings, the Board conducted informal "inquiries". This approach prevailed until fairly recently as reflected in the following passage from David Pratt (1988), 73 di 218; 1 CLRBR (2d) 310 (CLRB no. 686).

*"Section 87(1) (now section 130(1)) contemplates that the Board will act without delay and in a summary way. In response to those statutory requirements the Board deals with referrals under section 86(5) (now section 129(5)) as expeditiously and as informally as the circumstances allow. In the instant case, Mr. Pratt's referral was received on February 29, 1988 and the parties were notified on March 2, 1988 that the inquiry would commence on March 9, 1988 at Toronto. The inquiry took the form of a round-table discussion. There was no sworn testimony, cross-examination, legal argument or other such legal trappings that are normally associated with the Board's quasi-judicial proceedings. What the Board did was to ask questions and listen to the statements, opinions and suggestions from the parties, including the safety officer. Using that process the Board quickly gleaned a picture of the work place and what was causing Mr. Pratt's anxiety. The Board also learned the basis for the safety officer's decision."*

(pages 222; and 314; emphasis added)

Unfortunately, this informal approach by the Board seems to be giving way to a more formal and structured hearing-type process. As more and more parties show up at these inquiries represented by legal counsel, the trend is changing and the legal trappings of the quasi-judicial process are creeping back in. Single member quorums of the Board are being faced

with a host of preliminary objections going to jurisdiction, time limits and so on. Those involved are being sworn in as witnesses and the informal inquiry is taking on the air of a trial. Employees who have exercised their right to refuse are now being made to account for their actions through sworn testimony and cross-examination by counsel for employers which at times can be quite intense. This in itself could have a negative impact on the achievement of the purposes of Part II as employees who have been through this experience will probably think twice before exercising their right to refuse in the future.

Even safety officers are now being called as witnesses and are subjected to cross-examination which is bound to have a negative ripple effect on the performance of their day-to-day functions. The ability of safety officers to settle safety and health matters in an informal way will surely be inhibited if they are forced to reveal what has been said to them in trust while they are under oath before this Board. In any event, all of this sworn testimony is followed by legal argument which includes references to legal precedents which go to all sorts of things ranging from what is admissible and other such procedural matters to how safety officers must conduct themselves in accordance with the Code. These precedents come from jurisprudence which is growing rapidly in this field.

Aside from the enormous expense on all parties to this process, is this really the proper way to resolve safety and health matters? Should decisions about whether employees are in danger be based upon perceptions of credibility or be subject to the persuasiveness of one legal presentation as opposed to another? We think not. Notwithstanding the flexibility possessed by the Board and our ability to conduct

a hearing with less restrictions and more informality than the Courts, it is our respectful opinion that this adversarial "LEGAL" forum where procedure often overshadows substance is just as inappropriate as the adversarial collective bargaining system to resolve safety and health issues.

The existence of danger, the extent of danger or, the immediacy of danger to employees are surely not questions of law, so why should there even be an appeal in a judicial sense at all in these situations? If we continue the way we seem to be going, we will be permitting safety and health to slip into the same quagmire of legal procedures and precedents that have bogged down our labour relations under Part I of the Code. In this regard, we are rapidly approaching the point, if we have not already passed it, where lay people who appear before the Board without legal representation are at a distinct disadvantage regardless of the labour relations experience they may have. This is totally contrary to what was intended when tribunals like this were established and, we are confident that Parliament never intended that safety and health matters fall into this legal abyss which moves the subject far beyond the reach of the Minister of Labour who has the ultimate responsibility for occupational safety and health in the federal jurisdiction.

With the utmost respect, it seems to us that it would be much more in keeping with the spirit of the legislation if an alternative scheme could be devised to keep these safety and health matters in an industrial atmosphere rather than the legal settings in which they are now being decided. Occupational safety and health has emerged as a discipline unto itself and, in our opinion, it would be wise to utilize

the expertise that has developed within this discipline to attain informed and co-operative resolutions of these matters.

As a suggestion to stimulate thoughts in this direction, the Minister of Labour might consider amendments to the Code removing the Board from the scene and perhaps the powers under section 138(2) of the Code could be used to appoint neutral persons to inquire into and resolve these disputes where opinions of safety officers are being challenged. A major problem with this Board handling these matters is our lack of expertise in the field. In these days of computerized wizardry it would not be an insurmountable task to compile a list of qualified persons who are available across the country and who are knowledgeable in the various technologies and safety concerns of each industry that operates in the federal jurisdiction. These persons could have access to the expertise of institutions such as the Canadian Centre for Occupational Health and Safety and they could work in conjunction with safety and health committees or safety and health representatives which are already in place under the Code. The appointment of these persons as, for want of a better title, safety commissioners, who would report to the Minister and who could have the power to make binding recommendations to the parties, would ensure that these extremely important questions going to the degree of danger in the workplace are resolved in the spirit of Part II of the Code and that they remain at all times within the reach and authority of the Minister of Labour.

Before leaving this topic, we would like to make sure that our comments about the Board's role under Part II of the Code are not misconstrued. When criticizing the system, we refer only to references of safety officers' decisions to the Board

under section 129(5) of the Code where the Board becomes involved in the determination of whether danger exists. It is only these determinations which we feel can be best resolved in a more relevant forum. As far as the Board's other role under Part II of the Code where we deal with complaints under section 133 concerning reprisals against employees, these fall well within the expertise of the Board. Complaints of this nature are not unlike unfair labour practice complaints under Part I of the Code which turn on facts, inferences and credibility. They are also well suited for investigation and settlement attempts by the Board's officers. If they are not settled, they do call for a more formal approach where they are heard and determined by the Board.

### III

Having said our piece about the process, we now turn to the real question before us which is, were Messrs. Dumont et al in danger within the meaning of the Code when the safety officer ruled to the contrary on November 16, 1990? Before answering that question, we feel that it is necessary to set some background so that the refusals can be viewed in the proper perspective. Briefly, these matters go back to the fall of 1989 when CN notified the trade unions representing employees at the Vancouver Terminals that it was commencing an evaluation study into yard operations. This system-wide study, which was known as the Yard Productivity Project, had already been completed at other major centres across the country and it was due to commence in November 1989 at Vancouver. Fearful of the loss of work for their members,

and the possibility of more stringent work rules, the BLE and the United Transportation Union (UTU) protested against the Yard Productivity Project by calling an unlawful strike. This strike involved a massive slowdown which literally crippled operations at the Vancouver Terminals and the surrounding districts. Following an application by CN at that time, the Board issued a cease and desist order which brought the unlawful activities to a halt (see Canadian National Railway Company (1989), 90 CLLC 16,010 (CLRb no. 770)).

Since then, the study into yard productivity has been completed and some of the recommendations have been implemented. As a result, the tensions between CN and the BLE and UTU have increased and unrest amongst the union membership has been simmering just below boiling point. These labour relations tensions have also had an adverse effect on the occupational safety and health aspect of the relationship between the unions and CN. This was evidenced by documentation placed before us which illustrated a deterioration in safety and health communications between the parties to the point where the BLE withdrew from joint committee meetings. This state of affairs lasted from April to December 1990.

It was within this tense atmosphere that CN implemented a change in yard operations effective November 2, 1990. This change had the effect of reducing what is known as "TRANSFER A" movement of trains within the terminals and introducing "TRANSFER B" train movements. Without going too deeply into the details and technicalities, the basic difference between these movements of trains can be described for our purposes here as the elimination of certain pre-movement inspections thereby reducing the time required to get a train off to its

destination. Generally speaking, under "TRANSFER A", a train is inspected by a qualified car inspector prior to being moved. Also, the train crew has to do an inspection which requires a walk along the train to ensure that 85% of the brakes are operative and to make sure that no two cars with inoperative brakes are coupled together. When moving trains within terminals under "TRANSFER B" conditions, the need for inspections by a car inspector and the walking of the train by the crew is eliminated. The removal of these pre-movement inspections is partly compensated for by the presence of a system known as TIBS (Train Information Braking System). This sophisticated equipment, which is mounted on the train to monitor brake systems, includes an SBU (Sense and Braking Unit), an IDU (Input and Display Unit) and CLU (Communications Logic Unit). The TIBS system was approved for use on trains with no caboose by the Railway Transport Committee in 1987. To supplement this equipment, train brakes must be set prior to the movement of the train and a running brake test is obligatory as soon as possible after the train commences its movement. In addition to all of this, under "TRANSFER B" movements, speed limits are set at a maximum of 15 MPH. "TRANSFER B" movements of trains within terminals were approved by the Railway Transport Committee by regulation in 1986.

It was against that background that Messrs. Dumont et al refused to operate the train in question on the night of November 15, 1990 and, in the overall circumstances, we have little doubt that this refusal, as well as several others that occurred about the same time, were yet another symptom of the ongoing feud between CN and the BLE membership over the implementation of the yard productivity project. Keeping in mind that Messrs. Dumont et al initially indicated that their concerns were limited to the non-inspection of the two

chlorine cars by a qualified inspector which, we might add, was the sole issue addressed by safety officer Bartlett in his report of November 20, 1990, it became apparent during the hearing that one of the main underlying concerns for the BLE and its members was the elimination of the walking inspection of the trains by the crew prior to departure. This is certainly what Mr. Dumont emphasized in his letter dated December 2, 1990 when he asked that the safety officer's decision be referred to the Board:

*"There is no other way that it can be determined that a train has 85% of the brakes operative, or that two cars with inoperative brakes are coupled together, than to walk the train."*

We also noted with interest that this letter of Mr. Dumont's was a product of Mr. Garry Lloyd Ager who also refused to operate a train within a few days of the Dumont refusal. We mentioned Mr. Ager's ensuing referral to the Board earlier in these reasons. In that referral, Mr. Ager used somewhat similar language when corresponding with a regional safety officer on November 6, 1990. While there is nothing sinister in one employee assisting another with a referral letter, this perhaps insignificant indication of concerted activity does, however, show us that the loss of the opportunity to walk the trains was a major issue at least in the minds of these two employees when they exercised their right to refuse. Aside from the purported safety worries, this concern can probably also be tied to the fact that walking the trains is well known to be a favourite tool of train crews to slow things down when they are supposedly working to rule. The removal of this tool by the introduction of "TRANSFER B" brake testing methods could be viewed by the more militant BLE members as a deliberate ploy by CN to curtail their ability to actively resist operational changes.

This in turn leads to a widening of the rift between the parties over the whole concept of yard productivity.

Be that as it may, having considered everything the parties put before us, we can see no reason to upset the ruling of the safety officer in this particular matter. In the circumstances, there can be no room for doubt that the train that was to be operated by Messrs. Dumont et al was properly equipped and the movement of the train would have been executed in accordance with the regulatory scheme imposed by the Railway Safety Branch of Transport Canada. The waiving of the requirement for an inspection by a car inspector in given circumstances, as well as the removal of the need for a walking brake check by train crews in "TRANSFER B" movements are clearly standards which have been approved by the people at Transport Canada who are obviously highly trained and knowledgeable in the area of railway operations and safety. We are not about to second guess these people who have set the standards. If, in the opinion of the BLE and its members, these standards need fine tuning, the appropriate way to do this is through the safety and health committee forum or by representations to the proper authorities at Transport Canada. It is not through the right to refuse under Part II.

We are also satisfied that, during his investigation in the "wee hours" of the morning of November 16, 1990, safety officer Bartlett took all of these regulations into account and he was convinced that they all had been adhered to. He was also satisfied that the train in question was properly equipped and that its operation under "TRANSFER B" conditions posed no danger within the meaning of the Code to the crew or to other employees in the vicinity. While all of this was not covered in his report of November 20, 1990, it was set

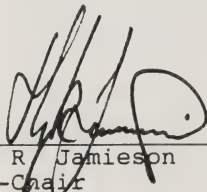
out clearly in his memo to file dated November 16, 1990 to which the parties had access. We have seen or heard nothing that would cast doubt upon his findings. We therefore confirm the decision of the safety officer.

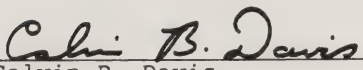
Before closing, we would like to make it very clear that we are not laying the blame for the troubled labour relations situation at the Vancouver Terminals solely at the feet of the affected trade unions and their members. What we have referred to about the unlawful strike by the BLE and the UTU, the withdrawal of the BLE from participation in the joint safety and health committee and about the elimination of the walking inspection of brakes in "TRANSFER B" movements being one of the underlying causes for the rash of refusals under Part II of the Code is only one side of the story. They are also symptomatic of the much larger problem of how the parties are dealing with the operational changes in the terminals which we do not wish to go into at this time. For the purposes of this reference we will simply say that communications is a two-way street. As we mentioned at one point during the hearing, we were astounded that the Acting President of the Vancouver Local of the BLE had to find out through cross-examination when he was called as a witness before the Board that "TRANSFER B" movement of trains had been operating safely at other terminals, such as Edmonton, for quite some time before November 1990 when they were introduced into the Vancouver Terminals. It also struck us during the expert testimony of Mr. Donald Barr, CN's Senior Manager, Engine Services, that what he was telling us about the technicalities of the various braking mechanisms and the braking capabilities of trains operating under "TRANSFER B" conditions, had probably never been explained in such convincing detail to the engineers who were expected to simply accept this unilaterally imposed change in the way

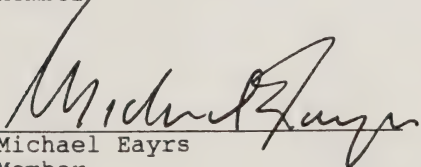
they were to operate trains. All of this is surely something that should have been discussed co-operatively at the safety and health committee level with input from both sides. The appropriate information could then have been disseminated to those directly affected. This may not have resulted in acceptance of the need for operational changes by the union membership at large, but at least they would have fully understood the safety aspect of the "TRANSFER B" movement of trains within the terminals.

As a parting plea, we strongly urge CN and the affected trade unions to take steps to mend their fences vis-à-vis communications and co-operative informed discussions on matters of safety and health. This would, in our respectful opinion, go a long way to easing the tensions at the Vancouver Terminals.

The foregoing is a unanimous decision of the Board.

  
\_\_\_\_\_  
Hugh R. Jamieson  
Vice-Chair

  
\_\_\_\_\_  
Calvin B. Davis  
Member

  
\_\_\_\_\_  
Michael Eayrs  
Member

DATED at Ottawa this 15th day of April, 1991.



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## Summary

A. DA SILVA ET AL, COMPLAINANTS,  
CANADIAN UNION OF POSTAL  
WORKERS, RESPONDENT, AND  
CANADA POST CORPORATION,  
EMPLOYER.

Board File: 745-3705

Decision No.: 869

## Résumé

A. DA SILVA ET AUTRE,  
PLAIGNANTS, LE SYNDICAT DES  
POSTIERS DU CANADA, INTIMÉ, ET  
LA SOCIÉTÉ CANADIENNE DES  
POSTES, EMPLOYEUR.

Dossier du Conseil: 745-3705

Décision n°: 869

These reasons deal with a complaint under section 37, the duty of fair representation provisions of the Canada Labour Code (Part I - Industrial Relations).

Les présents motifs traitent d'une plainte fondée sur l'article 37, c'est-à-dire sur les dispositions sur le devoir de représentation juste prévues par le Code canadien du travail (Partie I - Relations du travail).

The complainants allege the union's failure to process their suspension grievances (a 20-day and a 40-day) to the second level of the grievance procedure amounted to a breach of its duty under section 37. The missed time limits resulted in their grievances being dismissed by an arbitrator thereby denying the complainants the opportunity to have the merits of their grievances arbitrated.

Les plaignants allèguent que le syndicat a manqué au devoir que lui impose l'article 37 en ne portant pas leurs griefs relatifs à une suspension (l'une de 20 jours et l'autre de 40 jours) au second palier de la procédure de règlement des griefs. Parce que les délais n'avaient pas été respectés, leurs griefs ont été rejetés par un arbitre, privant ainsi les plaignants de la possibilité de faire juger du bien-fondé de leurs griefs à l'arbitrage.

Although the CUPW processed the grievances to arbitration, they concede that they missed the time limits at the second level of the grievance procedure.

Bien que le SPC ait porté les griefs à l'arbitrage, il concède qu'il n'a pas respecté les délais prescrits au second palier de la procédure de règlements des griefs.

The Board concluded that the conduct of the union giving rise to the complaint suggests that a simple mistake was made. There was no evidence of any kind to raise even the slightest suspicion that the union's conduct or lack thereof amounted to anything more than an oversight.

Le Conseil a conclu que les agissements du syndicat donnant lieu à la plainte semblaient indiquer qu'il ne s'agissait que d'une erreur. Il n'existait aucun élément de preuve pouvant soulever le moindre doute que le geste du syndicat, ou plutôt l'absence de geste, était autre chose qu'un oubli.



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Reasons for decision

A. da Silva et al.,  
complainants,  
Canadian Union of Postal  
Workers,  
respondent,  
and  
Canada Post Corporation,  
employer.

Board File: 745-3705

The Board was composed of Mr. Thomas M. Eberlee, Vice-Chairman, and Mr. François Bastien and Ms. Mary Rozenberg, Board Members.

Counsel of Record:

Mr. Joseph J.M. Hoffer, for the complainants;  
Mr. David Bloom, for the respondent; and  
Mr. Ian Szlajak, for the employer.

These reasons for decision were written by Ms. Mary Rozenberg, Member.

I

In the complaints filed with the Board on July 17, 1990, the complainants, Anthony da Silva and Allan L. Snider, allege that the Regional and National Offices of the Canadian Union of Postal Workers (CUPW) breached section 37 of the Canada Labour Code (Part I - Industrial Relations) by failing to proceed their grievances to the second level of the grievance procedure in accordance with the time limit provisions of the collective agreement. This failure resulted in the grievances being dismissed at the arbitration hearing held on March 20, 1990 without

merits of either of the grievances being heard.

Section 37 of the Code provides:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

## II

The complainants requested a hearing. Neither CUPW nor the Canada Post Corporation (CPC) commented on this matter. Section 98(2) of the Code permits the Board to dispose of this type of complaint without holding a public hearing:

*"98.(2) The Board may refuse to hold a public hearing on a complaint made in respect of an alleged contravention of section 37 or non-compliance with section 69 if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part."*

Having reviewed all of the material and submissions contained in the file, the Board concluded that to conduct a public hearing into this matter would not be consistent with the objectives of Part I of the Code. There is ample information contained in the file to enable the Board to fully comprehend the circumstances surrounding the complaint. The basic facts are not in dispute. It is not disputed that the time limits are indeed mandatory, or that the grievance was not processed in a timely way.

## III

The CUPW National Office concedes that the suspension grievances at issue were not brought to the second level

of the grievance procedure as required by the collective agreement. There is no explanation offered for the circumstances surrounding the missing of the step II time limits other than to identify the CUPW Regional Grievance Officer as the officer responsible. Should the Board conclude that the union violated section 37, the union requests that the Board order the union to restore the complainants to the position they would have been in had the union not breached its duty to the complainants and to order the employer to waive the time limits of the grievance procedure so that the merits of the grievances can be heard at arbitration.

The employer submits that the union's admission of error makes it incumbent on the union to explain precisely what happened with the suspension grievances of da Silva and Snider. The CPC opposes the waiver of time limits under the collective agreement and questions the Board's authority to intervene in grievances already disposed of on technical grounds by an arbitrator.

The complainants submit that neither of them had any responsibility for ensuring that the grievances were processed through the steps of the grievance procedure in a timely fashion. That responsibility, they submit, rests with the CUPW Regional Office in Toronto and the CUPW National Office in Ottawa.

The complainants further submit that, as the complaints are properly before the Board, the Board has the power and duty to review the complaints and to provide a remedy pursuant to sections 37, 97, 98 and 99 of the Code. They submit that the remedial provisions of the Code are broad enough to encompass an order directing that the time limits under the collective agreement be waived by the

employer and that the grievances proceed to arbitration to be heard on their merits. Should the Board conclude that the conduct of the union constitutes a violation of section 37 but fail to refer the merits of the grievances to arbitration, the complainants request that the Board order the union to restore the complainants to the position they would have been in had the union not breached its duty to the complainants and further requests that the Board, itself, consider the merits of the complainants' grievances to determine such damages.

#### IV

The grievances giving rise to this complaint were processed and referred to arbitration. CUPW intended to arbitrate the complainants' grievances. The grievances however were not brought to the second level of the grievance procedure in a timely fashion. The representation under scrutiny is the conduct of the union and in particular the conduct of the union officials responsible for processing the complainants' suspension grievances.

There are no allegations, nor is there evidence, of bias, prejudice, ulterior motive or any animus against the complainants on the part of the officials who committed the error.

It is well known that a considerable number of grievances are processed through the CUPW/CPC grievance procedure. It would not be surprising if there were errors. Indeed there have been. See Don Greenwood et al. (1990), 90 CLLC 16,034 (CLRB no. 795); Dave Mullin (1991), as yet unreported CLRB decision no. 852; and Cathy Miller (1991), as yet unreported CLRB decision no. 854.

In Cathy Miller, supra, the Board said:

"It might be argued that any reasonable person would conclude that the consequence of C.U.P.W. running such a system, and using the system in the way it seems to do, would inevitably be mistakes, some of which would be bound to have serious consequences; such mistakes, arising inevitably out a [sic] system that any reasonable person could recognize as being seriously flawed, would in reality fall into the category of serious negligence.

On the other hand, this is the system that the membership of C.U.P.W. has established and tolerates. The Board's jurisprudence in duty of fair representation complaints follows fairly consistently the line that the system adopted by a union is basically its own business; that the Board has no mandate to reform a union system in order to make it more perfect; that the Board's role, in respect of duty of fair representation complaints, is to ensure that the system has worked as it is apparently intended to work, without the complainant's situation being handled outside the norm. ..."

(page 16-17)

The Board dealt at length with the duty of fair representation test in Cathy Miller, supra, and had this to say:

"In viewing failures by unions in their representation of employees, the C.L.R.B., other labour relations boards and the courts have distinguished between negligence that is merely 'simple' and negligence that is 'serious'. In the Brenda Haley case (see Brenda Haley (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLLC 16,070 (CLRB no. 271); and Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304)), the full Board in plenary session made a policy decision that 'simple negligence' was not a breach of the duty of fair representation but that seriously negligent conduct would equate to arbitrariness and be in violation of section 37. Similarly the Supreme Court of Canada in Canadian Merchant Service Guild v. Gagnon, [1984] 1 S.C.R. 509, at page 567 said in effect that union representation must be 'without serious or major negligence' and in Centre hospitalier Regina Ltee v. Labour Code, [1990] 1 S.C.R. 1330, pages 1348-1349, repeated that a union must represent the employee without 'serious negligence'.

...

A recent decision of the Board, Don Greenwood et al. (1990), 90 CLLC 16,034 (CLRB no. 795), dealt with the failure of C.U.P.W. to file a grievance within the

time limit specified in the collective agreement. The grievance had to do with a matter of considerably less gravity than is the case here, but the facts surrounding the union's failure were far less straightforward than the situation in this matter. The Board characterized that failure as 'simple negligence' and not, as such, a violation of the section of the Code.

Our problem is to decide whether C.U.P.W.'s failure was 'simple' or 'serious' negligence. The facts in Brenda Haley, supra, and Don Greenwood et al., supra, convinced the Board in each instance that the negligence was simple. The Quebec Labour Court has defined serious or gross negligence in Association Montréalaise d'Action Recreative et Culturelle, no. 500-28-000608-786, August 8, 1979 (T.T.) as 'an attitude marked either by gross error, by serious mistake committed by its representatives, by an unforgivable omission of requisite precautions, by an acknowledged or obvious lack of fitness, or by a manifest lack of concern...'. "

(pages 13-14)

Should the union be held strictly liable for a procedural error resulting in the failure to arbitrate the merits of the grievances giving rise to this complaint?

The Ontario Labour Relations Board said in I.T.E. Industries Limited, [1980] OLRB Rep. July 1001:

"It is clear that in order to establish a breach of section [68], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a 'flagrant error' consistent with a 'non caring attitude', or have acted in a manner that is 'implausible' or 'so reckless as to be unworthy of protection'. In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability."

(page 1008)

This panel is aware of the consequences of the missed time limits for the complainants; da Silva's 20-day suspension resulted in a loss of 22 days' pay and benefits and Snider's 40-day suspension resulted in the loss of 40 days' pay and 2 months' benefits. And they have been

deprived of the opportunity to have their suspension grievances arbitrated on their merits. Although we can sympathize with the complainants, sympathy is not ground for Board intervention. In Dave Mullin, supra, the consequences for the complainant were more critical in that he was dismissed from his employment because the union missed a crucial time limit while processing his grievance to arbitration. Nevertheless the Board said that although serious adverse effect on complainants is a reason to scrutinize the conduct of a bargaining agent more strictly, it is not determinative of a violation of the union's duty of fair representation.

The Board's role in reviewing the union's duty under section 37 of the Code is not concerned with and does not apply to internal union matters other than to ensure that the trade union does not act in a manner that is discriminatory, arbitrary or in bad faith. When the subject-matter of the complaint is a complainant's dissatisfaction with the nature of the internal union procedures concerning the processing of his grievance, section 37 is not intended, nor is it to be used, as an avenue to appeal internal union processes.

In Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304), the Board made the following comments:

*"It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation*

does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies."

(pages 324; 131; and 615)

Time limits are valid features of collective agreements. They apply to employers as well as to unions. They are designed to help ensure finality with respect to the resolution of dispute. They also assist to buttress stability in industrial relations for the mutual benefit of all parties. See Cathy Miller, supra, at page 7.

In Dave Mullin, supra, the Board said:

"The underlying concern is, of course, the potential adverse impact of unwarranted Board intrusion in the collective bargaining process. If a union is to be found guilty of violating section 37 of the Code every time it misses a time limit in a dismissal grievance then what is the point of the parties negotiating these time provisions and including them in their collective agreements? In this particular case, an arbitrator has dealt with the missed time limits and sustained Canada Post's protection under the relevant provision of the collective agreement. He did so after considering virtually the same circumstances which we have before us about the union's handling of the grievance and decided not to exercise his discretion under the collective agreement to waive the time limits. In these circumstances, it would be wrong in our opinion for the Board to use this complaint as an excuse (and it would be a flimsy excuse) to provide the union with a means to get around the arbitrator's ruling. Before the Board uses its extraordinary remedial powers to intervene in these situations to negate provisions in collective agreements which parties have negotiated in good faith, there surely has to be solid grounds for doing so. ..."

(pages 13-14)

This Board has the discretion and the responsibility to exercise caution in the use of its supervisory and remedial powers over the duty of fair representation, and

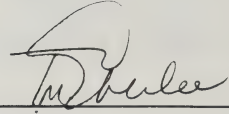
to detect and remedy only abuses of the exclusive representation authority of bargaining agents. The Board's powers were never intended by Parliament to be used to fix perceived defects in the system or to correct all apparent injustices.

V

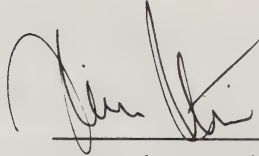
On the basis of the particular facts of this case, the conduct of the union giving rise to the complaint suggests that a simple mistake was made. There is no evidence of any kind before this panel to raise even the slightest suspicion that the union's failure to process the grievance amounted to anything more than an oversight.

Consequently, we conclude that the union did not act in a manner that is arbitrary, discriminatory, or in bad faith.

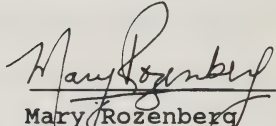
These complaints are accordingly dismissed.



Thomas M. Eberlee  
Vice-Chairman



François Bastien  
Member of the Board



Mary Rozenberg  
Member of the Board

Dated at Ottawa, this 15th day of April 1991.

# information

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## SUMMARY

QUEBEC PORT TERMINALS INC., APPLICANT, THE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1375, AND THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1846, RESPONDENTS, AND THE MARITIME EMPLOYERS' ASSOCIATION, MIS-EN-CAUSE.

## RÉSUMÉ

TERMINAUX PORTUAIRES DU QUÉBEC INC., REQUÉRANTE, SYNDICAT CANADIEN DE LA FONCTION PUBLIQUE, SECTION LOCALE 1375, ET ASSOCIATION INTERNATIONALE DES DÉBARDEURS, SECTION LOCALE 1846, INTIMÉS, ET ASSOCIATION DES EMPLOYEURS MARITIMES, MISE EN CAUSE.

Board File: 556-105

1 SEP 2 1991

Dossier du Conseil: 556-105

Decision no.: 870

Décision n°: 870

This refers to an application for a change of terms and conditions of employment filed by an employer in the longshoring industry, following the filing of an application for certification under section 24(4) of the Canada Labour Code (Part I - Industrial Relations). A previous certification was already covering several employers. The employers had a disagreement. Certification granted to new bargaining agent. Application redundant. Application dismissed.

Demande de modifications des conditions de travail par un employeur suite au dépôt d'une requête en accréditation, paragraphe 24(4) du Code canadien du travail (Partie I - Relations du travail). Secteur du débardage. Accréditation multipatronale préexistante. Désaccord entre employeurs. Nouvelle accréditation émise. Demande caduque. Rejetée.

A trade union (CUPE) filed an application for certification to dislodge another union (ILA) certified under section 34 of the Code. An employers' association (MEA) has been designated since 1987 to represent all employers. A dissident employer (QPT) wants to change the salaries of a portion of the employees of the unit.

Un syndicat (SCFP) a présenté une requête en accréditation visant à déloger un autre syndicat (AID) accrédité en vertu de l'article 34 du Code. Une association patronale (AEM) est désignée depuis 1987 pour représenter tous les employeurs. Un employeur dissident (TPQ) veut modifier les salaires d'une partie des employés de l'unité.

Since the filing of the application, another trade union (CUPE) has been certified for more than 30 days. The application is moot and therefore dismissed.

Depuis la présentation de la demande, un autre syndicat (SCFP) a été accrédité depuis plus de 30 jours. Demande caduque. Demande rejetée.

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Reasons for Decision

Québec Ports Terminals Inc.,  
*applicant,*  
*and*

Canadian Union of Public  
Employees, Local 1375, and  
International Longshoremen's  
Association, Local 1846,

*respondents,*

*and*

Maritime Employers' Association,  
*mis-en-cause.*

Board File: 556-105

---

The Board was composed of Mr. Serge Brault, Vice-Chairman,  
and Ms. Evelyn Bourassa and Mr. Robert Cadieux, Members.

Appearances:

Mr. Luc Huppé, for Québec Ports Terminals Inc.;

Mr. Yves Morin, for the Canadian Union of Public Employees,  
Local 1375;

Mr. Pierre Langlois, for the International Longshoremen's  
Association, Local 1846; and

Ms. Manon Savard, for the Maritime Employers' Association.

These reasons for decision were written by Mr. Serge Brault,  
Vice-Chairman.

I

The Proceeding

These reasons deal with an application filed pursuant to  
section 24(4) of the Canada Labour Code (Part I - Industrial  
Relations) concerning what is commonly called a freeze on  
terms and conditions of employment. The Board did not deem  
it necessary to hold a hearing in this case in view of the  
written submissions filed and its conclusions.

Section 24(4) reads as follows:

*"24.(4) Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right or privilege of such employees until*

*(a) the application has been withdrawn by the trade union or dismissed by the Board, or*

*(b) thirty days have elapsed after the day on which the Board certifies the trade union as the bargaining agent for the unit,*

*except pursuant to a collective agreement or with the consent of the Board."*

The application was filed on January 18, 1991 by a longshoring company, Québec Ports Terminals Inc. (TPQ). This company uses the services of unionized dockers in the port of Bécancour. On the date this application was filed, the bargaining agent for these dockers was Local 1846 of the International Longshoremen's Association (ILA) which was certified under a multi-employer certification order issued under section 34 of the Code. The Board deems it appropriate to quote part of that provision:

*"34.(1) Where employees are employed in*

*(a) the longshoring industry, ...*

*the Board may determine that the employees of two or more employers in such an industry in such a geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit."*

TPQ's application followed an application for certification by the Canadian Union of Public Employees, Local 1375 (CUPE), to displace the ILA. It is important to point out that the Maritime Employers' Association (MEA) was made a party to this proceeding since it was designated under

section 34 of the Code as the employer of the dockers in question at the time the application was filed.

According to TPQ, it requires the Board's consent to increase the base rate of pay of its employees, for the following reasons:

*"7.1 The applicant's employees have not had a pay increase for more than four (4) years.*

*7.2 This rate of \$17.80 corresponds to the rate paid for the same services in the ports of Montréal and Québec.*

*7.3 For the reasons stated in the intervention it filed in file 555-3208, reasons which the applicant repeats here, the applicant has been prevented by the MEA from negotiating new terms and conditions of employment with its employees since the expiry of collective agreement R-1.*

*7.4 More particularly, prior to CUPE's application for certification, the applicant had instructed the MEA, which the Board confirmed as the agent of the applicant, to negotiate with the ILA the text of a memorandum of understanding concerning this increase, as reported in a letter of August 9, 1990 filed in support of the present application as Exhibit R-2.*

*7.5 The MEA refused to comply with the applicant's instructions, as reported in a letter of August 24, 1990 filed in support of the present application as Exhibit R-3, without giving a sufficient reason that would warrant its refusing to obey the instructions of the applicant, its principal.*

*7.6 It is in the interests of the applicant and its employees, as well as in the interests of industrial peace, that the applicant be authorized to pay the proposed pay increase."*

(translation; emphasis added)

## II

### The Facts

As the above facts reveal, TPQ's application comes in the midst of a dispute between employers. The Board notes that the ILA was certified in 1987, over TPQ's objection, to represent all dockers in the ports of Bécancour and Trois-Rivières in a single bargaining unit (Maritime Employers'

Association and Terminaux Portuaires du Québec (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRBR no. 642)).

Following this decision, the MEA, the employer organization, was in turn appointed, in accordance with section 34(3) of the Code, to the Board's satisfaction, but over TPQ's objection, the agent of the employers covered by the union's certification (Maritime Employers' Association and Terminaux Portuaires du Québec (TPQ) (1987), 72 di 26; and 88 CLLC 16,007 (CLRBR no. 658)). The MEA was thus invested, by all the employers, with the necessary powers to discharge the duties and responsibilities of an employer under Part I of the Code, the whole in accordance with paragraphs (a) and (b) of section 34(3), which read as follows:

*"34.(3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall order that*

*(a) one agent be appointed by the employers of the employees in the bargaining unit to act on behalf of those employers; and*

*(b) the agent so appointed be appropriately authorized by the employers to discharge the duties and responsibilities of an employer under this Part."*

TPQ, for its part, was and continued to be, clearly against its wishes, one of the employers covered by the union's certification and hence represented by the MEA. It objected to these two Board decisions and challenged them in the Federal Court of Appeal. The Court, in a common judgment, dismissed TPQ's two applications, thereby affirming the Board's decisions (Terminaux Portuaires du Québec Inc. v. Association des employeurs maritimes et al. (1988), 89 N.R. 278; and 89 CLLC 14,009 (F.C.A.)). TPQ's efforts to have the Supreme Court of Canada review the judgment of the Federal Court of Appeal failed, the high court having in both cases denied TPQ leave to appeal this judgment

(Terminaux Portuaires du Québec Inc. v. Maritime Employers' Association et al., file no. 032095, October 20, 1988 (S.C.C.)).

Although this application does not recount the various proceedings that produced the present legal situation in the ports of Bécancour and Trois-Rivières, TPQ nevertheless acknowledges this situation in paragraph 3 of its application:

*"3. The mis-en-cause Maritime Employers' Association (MEA) was confirmed by the Board as the agent of all the employers of the employees in the bargaining unit in respect of the certification granted the ILA."*

(translation)

Not content with the proceedings it instituted in the Federal Court of Appeal, TPQ applied at the same time for an injunction in Quebec Superior Court (file no. 500-05-009311-885), a proceeding in which the Board was not impleaded. TPQ's objective was to prevent the MEA from entering into a collective agreement with the ILA without its approval. This matter is now pending in the Quebec Court of Appeal, at the initiative of the MEA (file no. 500-09-000287-904). In practice, the MEA has not entered into a collective agreement with the ILA since it was certified in 1987.

If, on the date this application was filed, the ILA was still the certified bargaining agent for the dockers covered by the application, such is no longer the case. The Board in fact granted CUPE's application for certification on February 12, 1991 (file 555-3208). In so doing, the Board at the same time revoked the ILA's certification in accordance with section 36 of the Code.

Section 36(1)(c) stipulates the following:

"36.(1) Where a trade union is certified as the bargaining agent for a bargaining unit,

...

(c) the trade union so certified is substituted as a party to any collective agreement that affects any employees in the bargaining unit, to the extent that the collective agreement relates to those employees, in the place of the bargaining agent named in the collective agreement or any successor thereto."

### III

#### Arguments of the Parties

When it was certified by the Board in 1987 (Maritime Employers' Association and Terminaux Portuaires du Québec (642), supra), the ILA was already a party to a collective agreement with TPQ through voluntary recognition. Relying on this fact, the ILA argued that in this case, TPQ's application was pointless and redundant. According to the ILA, the rates of pay stipulated in that expired collective agreement, which was nevertheless apparently still recognized by TPQ, were those described by TPQ in its application and the increase that it claimed to want to pay was in fact provided for in this agreement. In short, argued the ILA, the exercise was pointless.

The MEA and CUPE also objected to the application which they termed pointless, adding that TPQ lacked the status required to file this application under section 24 because it was not an employer for the purposes of this provision. CUPE added that the bargaining unit comprised more than merely TPQ dockers and, in its view, the unit must be considered as a whole and the application dismissed for this additional reason.

TPQ, for its part, stressed its good faith and its desire to improve the dockers' working conditions.

#### IV

##### The Law

Section 24(4) has a twofold purpose. First, to protect the right of association recognized by section 8 of the Code by dissuading the employer from trying to influence unduly its employees in their choice of a bargaining agent. As the Board put it:

*"The objective is to ensure that no action by the employer as regards rates of pay or any other term or condition of employment or any right or privilege of employees is going to deny the employees full freedom in the exercise of their right to seek collective bargaining and to opt for a specific bargaining agent. This is paramount."*

(Canadian Imperial Bank of Commerce (Creston and St. Catharines) (1979), 35 di 105; [1980] 1 Can LRBR 307; and 80 CLLC 16,002 (CLRB no. 202), pages 123, 321; and 366; emphasis added)

Second, this provision is designed to maintain the status quo (see Canadian Imperial Bank of Commerce, supra, pages 123; 321; and 366; Maritime Employers' Association (1986), 68 di 40; and 87 CLLC 16,024 (CLRB no. 601), pages 42-43; and 14,194; Larose-Paquette Autobus Inc. (1990), as yet unreported CLRB decision no. 792, page 36; and Mid-Continental Tank Lines Inc. (1986), 64 di 97; and 12 CLRBR (NS) 138 (CLRB no. 558), pages 106-107; and 148-150).

However, this provision has an entirely different purpose when we are in a raid situation, i.e. where the employees already have a bargaining agent. Considering the effect on the Board's role of the addition of this provision to the Code, the Board had this to say:

*"A new role is created for the Board. Except in the circumstances where there is an existing collective agreement where terms and conditions of employment are clearly delineated, it becomes the responsibility of the Board to ensure that nothing is done which may affect the employees' right of selection. ..."*

*(Canadian Imperial Bank of Commerce, supra, pages 125; 322 and 367; emphasis added)*

All this means that so long as the union being raided continues to be certified, the employer - if in fact there is an employer within the meaning of the Code - that wishes to alter terms and conditions of employment governed by the collective agreement must deal with this certified union. Although it does not have to decide this matter in this case, the Board has difficulty seeing in the name of what principle it could substitute its own opinion for that of the incumbent union.

According to the Code, certification has the following effect:

*"36.(1) Where a trade union is certified as the bargaining agent for a bargaining unit,*

*(a) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit; ..."*

The Board has said in the past that filing an application for certification in no way weakened the incumbent union's right to bargain, let alone its obligation to bargain in good faith (Maritime Employers' Association (601), supra). The ILA therefore never relinquished its exclusive right to bargain until CUPE was certified.

According to the ILA, the terms and conditions of employment that TPQ wanted to "alter" were in fact existing terms and conditions governed by a collective agreement that was presumably still valid.

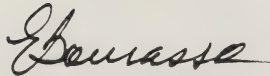
Be that as it may, even if we assume that the Board has the authority TPQ claims it has and that TPQ had the status of an employer for the purposes of section 24(4), TPQ's presumed obligation ended in the instant case "thirty days ... after the day on which the Board [certified]" CUPE (section 24(4)(b)). That certification was granted on February 12, 1991.

Consequently, even if it were valid, this application became moot solely by reason of the passage of time. This is reason enough to dismiss it.



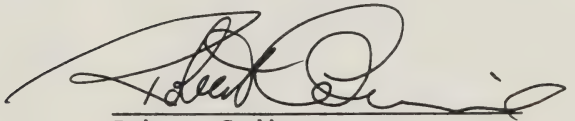
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Serge Brault  
Vice-Chairman



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Evelyn Bourassa  
Member of the Board



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Robert Cadieux  
Member of the Board

ISSUED at Ottawa, this 24th day of April 1991.



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## Summary

BRIAN J. O'CONNOR, COMPLAINANT,  
CANADIAN AIR LINE PILOTS ASSOCIATION,  
BARGAINING AGENT/RESPONDENT, AND  
CANADIAN AIRLINES INTERNATIONAL LTD.,  
EMPLOYER.

Board File: 745-3506

Decision No.: 871

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peuvent être utilisés à des fins  
juridiques.

## Résumé de Décision

BRIAN J. O'CONNOR, PLAIGNANT,  
ASSOCIATION CANADIENNE DES PILOTES DE  
LIGNES AÉRIENNES, AGENT NÉGOCIATEUR  
INTIMÉ, ET LIGNES AÉRIENNES CANADIEN  
INTERNATIONAL LTÉE, EMPLOYEUR.

Dossier du Conseil: 745-3506

N° de Décision: 871

These reasons deal with a complaint  
under the duty of fair representation  
provisions contained in section 37 of  
the Canada Labour Code (Part I -  
Industrial Relations). The  
circumstances giving rise to the  
complaint involve the determination  
of seniority of the complainant, Mr.  
O'Connor, who says that the Canadian  
Air Line Pilots Association (CALPA)  
deliberately and with bias falsely  
calculated his length of service  
statistics and refused to acknowledge  
some 496 days of service when he flew  
with Eastern Provincial Airways back  
in 1983 to 1985.

The complaint was dismissed as being  
untimely under section 97(2) of the  
Code. In its reasons the Board  
addresses the issue raised by CALPA  
as to whether the determination of  
seniority by way of a process  
contained in the union's constitution  
properly falls within the scope of  
section 37 of the Code. The Board  
answered in the affirmative.

Les présents motifs traitent d'une  
plainte présentée en vertu des  
dispositions relatives au devoir de  
représentation juste prévues à  
l'article 37 du Code canadien du  
travail (Partie I - Relations du  
travail). Les circonstances qui ont  
donné lieu à la plainte concernent la  
détermination de l'ancienneté du  
plaignant, M. O'Connor, qui prétend  
que l'Association canadienne des  
pilotes de lignes aériennes  
(l'Association) a délibérément et  
injustement faussé les statistiques  
relatives à la durée de son service  
et a refusé de reconnaître les quelque  
496 jours de service qu'il a effectués  
lorsqu'il volait pour Eastern  
Provincial Airways entre 1983 et 1985.

La plainte a été rejetée parce qu'elle  
avait été présentée hors délai aux  
termes du paragraphe 97(2) du Code.  
Dans ses motifs, le Conseil examine  
la question posée par l'Association,  
soit celle de savoir si la  
détermination de l'ancienneté selon  
un procédé prévu par les statuts et  
règlements du syndicat s'inscrit dans  
la portée de l'article 37 du Code.  
Le Conseil a répondu par  
l'affirmative.



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Reasons for decision

Brian J. O'Connor

*complainant,*

Canadian Air Line Pilots  
Association,

*bargaining agent/respondent,*

and

Canadian Airlines International  
Ltd.,

*employer.*

Board File: 745-3506

---

The Board was composed of Vice-Chair Hugh R. Jamieson and Members Calvin B. Davis and Michael Eayrs.

Appearances: (on record)

Brian J. O'Connor, for himself;

Ms. Lila Stermer, for the Canadian Air Line Pilots Association; and

Mr. Patrick Saul, for Canadian Airlines International Ltd.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

In this complaint by Mr. Brian O'Connor who is employed as a First Officer with Canadian Airlines International Ltd. (CAIL), it is alleged that the Canadian Air Line Pilots Association (CALPA or the union) and several other named individual respondents had violated the duty of fair representation provisions of the Code by failing to give Mr. O'Connor seniority credit for service with another airline with whom he was employed.

Since this complaint was filed with the Board on January 15, 1990 Mr. Peter Suchanek, the Board's Regional Director at Toronto, has spent many hours gathering the relevant information and attempting to assist the parties to settle the matter. All of this time and effort was, however, to no avail and Mr. Suchanek filed his report to the Board on April 10, 1991. This report is comprehensive to the point that, when taken with all of the written submissions and other documentation received from the parties, the Board has before it the complete factual picture as well as the positions of the parties. This being so and, the Board being of the view that it would not be in the interests of achieving the purposes of the Code to prolong this dispute further by conducting a public hearing, it decided to dispose of this complaint without a hearing as permitted by section 98(2) of the Code:

*"98.(2) The Board may refuse to hold a public hearing on a complaint made in respect of an alleged contravention of section 37 or non-compliance with section 69 if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part."*

The matter was therefore dealt with by this quorum of the Board at Ottawa on April 25, 1991.

## II

The circumstances giving rise to the complaint go back to 1984 when Canadian Pacific Airlines (CP Air) acquired Eastern Provincial Airways (EPA). At that time, Mr. O'Connor had some flying experience with both airlines.

His employment history is set out at page 3 of the Board officer's report:

"The Complainant's Employment History

*The complainant was hired originally by CP Air on March 31, 1980. He flew with the airline for the next 27 months until he was laid-off on June 15, 1982. He retained his rights to recall at all times.*

*On April 21, 1983, the complainant was hired by EPA. At the time, the pilots were engaged in legal industrial action with this employer. The complainant continued in the employ of EPA for 10 months until being placed on lay-off status February 17, 1984.*

*The complainant was recalled to EPA over a year later on May 10, 1985 and worked for an additional 6 months before again being laid-off on November 20, 1985.*

*On March 5, 1986, the complainant was recalled by CP Air and he rejoined its pilot ranks as a first officer. He has been continuously employed without lay-off throughout all the ensuing mergers which lead ultimately to the formation of Canadian Airlines International."*

As a result of the acquisition of EPA by CP Air, CALPA invoked its "Merger Policy" which is contained in section IV of the union's constitution. This is a complex procedure where the Master Executive Councils of CALPA from each affected airline appoint merger representative teams to handle the integration of the seniority lists in accordance with the union's constitution. The process is explained in capsulized form at page 2 of CALPA's submission of June 7, 1990:

- "8. The merger representatives of each group gather data on employment date, seniority date, seniority number, furlough time and leave of absence time for each pilot on their seniority lists, compute each pilot's length of service without crediting furlough time and then arrange for each individual pilot to verify his length of service computation;*
- 9. The merger representatives then negotiate directly in an attempt to compile an integrated list;*

10. *Where direct negotiations fail, the Merger Policy provides for mediation, at the discretion of the parties or the President;*
11. *As a final resort, if mediation and direct negotiations fail to result in an integrated seniority list, the Merger Policy provides for final and binding arbitration;*
12. *The final list must maintain the relative positions of the pilots on their respective current seniority lists;*
13. *The Merger Policy requires that CALPA accept the integrated list within 5 days of its issuance and immediately initiate negotiations with the successor airline to include the list in the agreement between CALPA and the successor airline;"*

The CP Air-EPA merger policy negotiations came to an impasse and the matter went to arbitration which resulted in a majority decision with the award merging the two seniority lists on a three CP Air to one EPA dovetailed ratio. The EPA pilot nominee dissented. The effect of this arbitration decision on the complainant was that the merged seniority list included only his CP Air service, not his EPA employment time. This was in November 1986.

In 1987, the CALPA merger policy was invoked again after Pacific Western Airlines (PWA) purchased CP Air. This seniority merger also included pilots of Nordair which had been taken over by CP Air. These three-way merger policy negotiations were eventually submitted to arbitration with a binding award being handed down. This award did not change Mr. O'Connor's standing vis-à-vis his position in the CP Air seniority list. All three groups were bound to go to the arbitrator with their current seniority lists which were in effect at that time, therefore, the question of Mr. O'Connor's

past EPA service was not addressed. The resultant merged seniority list became effective in June 1988. By then, the employer was of course CAIL.

Since then, in February 1990, another merger of seniority lists has taken place. This time it was between the pilots of CAIL and Wardair and again, the matter was settled at binding arbitration. Mr. O'Connor's position on this latest merged seniority list remained as it was, i.e., his EPA service was still not acknowledged. This was understandable as the specifics of his claim to cumulative service was not before the arbitrator. CALPA proceeded with this merger as it had done in the past. For the purposes of the merger policy, only the relative position of pilots on their current seniority list is considered. CALPA maintains that this is in accordance with subsection A1(d) of section IV of the union constitution which provides:

*"The relative position of pilots on their current seniority list, as determined by the following procedures, must be maintained in any integrated seniority list."*

Mr. O'Connor says that this is contrary to Article 20 of the collective agreement between CALPA and CAIL which provides:

*"20.01 Seniority of a pilot shall be based upon the length of continuous service as a pilot on airline and/or bush operations with the company or with other companies whose operations have been taken over by the company prior to the signing of this agreement, provided that the pilot was employed as a pilot in airline or bush operations at the time such company's operations were taken over by the company."*

(emphasis added)

Mr. O'Connor claims that these provisions clearly require that his 496 days of service with EPA be added to his cumulative service with CP Air. He further submits that CALPA has deliberately and with bias, falsely calculated his length of service statistics. While he does not come right out and say it, the inference is certainly there that Mr. O'Connor feels that CALPA is getting back at him for flying for EPA during the lawful strike by EPA pilots back in 1983.

### III

We appreciate that the foregoing is a somewhat sketchy summary of the facts and circumstances which were placed before us but it is sufficient to set the background for our purposes to deal with two of the major issues raised by CALPA. These are the timeliness of the complaint and CALPA's submission that the matters complained of go to the application of internal union policies and not to rights flowing from a collective agreement, therefore the complaint is not one properly covered by section 37 of the Code:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

Dealing with the second topic first, we would point out to CALPA that seniority is a fundamental and often

critical consideration for many substantial rights flowing from collective agreements, i.e., promotions, transfers and, probably more important, lay-offs. According to CALPA's own description of the merger policy which we reproduced earlier in these reasons, any integrated seniority list is put to the employer for inclusion in the collective agreement. The acceptance of these lists by the employer is normally only a matter of form and they become an integral part of the collective agreement. The seniority of the pilots for the purposes of the administration of the collective agreement is thereafter considered according to the position on the seniority list.

With respect, it is difficult for us to see how the method of determining the seniority position on the list can be separated from the seniority rights included in the collective agreement. Notwithstanding that the merger policy is part of the union's constitution, it seems to us that it would naturally follow that the rules to determine seniority cannot be, in themselves, discriminatory nor can the rules be applied in a manner that is arbitrary, discriminatory or in bad faith. All of this surely falls squarely within the duty of fair representation as contemplated by section 37 of the Code. To rule otherwise would be to provide an escape hatch for trade unions to avoid their responsibilities under the Code. In addition to issues such as seniority, for example, unions could easily include provisions in their constitutions regarding their discretion whether to proceed to arbitration with grievances and then claim that this subject no longer falls within the jurisdiction of the Board. In our opinion, the determination of seniority which influences

rights flowing from a collective agreement is a subject that comes within the ambit of the Board's supervisory role over the duty of fair representation regardless if the process is contained in a union's constitution, by-laws or other internal process.

Turning to the timeliness of the complaint, section 97(2) of the Code provides:

*"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."*

According to CALPA, the whole thrust of the complaint goes to the non-recognition of Mr. O'Connor's EPA service which was a fait accompli back in 1986 when the CP Air and EPA seniority lists were integrated. The union says that if there is any merit to the complaint, which it denies, it should have been filed within 90 days of the publication of that seniority list.

Mr. O'Connor denied that he knew that his EPA service was not calculated in his service statistics used by CALPA at that time but he does admit that he was aware of this fact when the CP Air-PWA-Nordair merger took place. Mr. O'Connor says that he has been trying to have the situation corrected since then but that it was not until he was notified by CALPA on or about December 12, 1989 that he actually knew that the union was not taking his challenge to his position on the seniority list any further.

In the circumstances, we have no option but to uphold CALPA's position and to find that this complaint is untimely. It is our finding that Mr. O'Connor clearly knew, or ought to have known, about the circumstances giving rise to his complaint long before the 90 days preceeding the date of filing on January 15, 1990. Giving him every benefit of the doubt, the latest date we can accept for the commencement of the 90-day period for the purposes of section 97(2) is some time shortly after April 2, 1987 when the employment data used in the CP Air-PWA-Nordair merger was distributed to all affected pilots. Mr. O'Connor knew at that time that his EPA flying time was not included in his service statistics and that his position on that integrated seniority list was determined on that basis. His requests that the EPA service be recognized were turned down by CALPA at that time. The 90 days for filing a complaint to the Board have therefore long since expired and the fact that Mr. O'Connor made another demand when the CAIL-Wardair merger was imminent and that he received another refusal from CALPA by way of a letter of December 12, 1989, does not re-open the already expired time limits under section 97(2).

This is precisely what the Supreme Court of Canada referred to in Upper Lakes Shipping Ltd. v. Mike Sheehan et al. [1979] 1 S.C.R. 902; 95 D.L.R. (3d) 25; and 79 CLLC 14,192:

*"...However, I cannot agree that there can be any number of requests and refusals, relating to the same circumstances, to enable a complainant to found a succession of complaints under s.187(1) (now s.97(1)) so long as he takes care to bring them successively within ninety days of any request and refusal. That would make a mockery of s.187(2) (now s.97(2))..."*

(pages 908; 29; and 40)

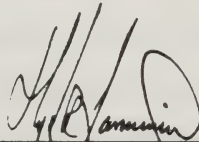
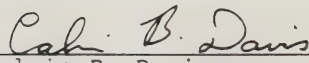
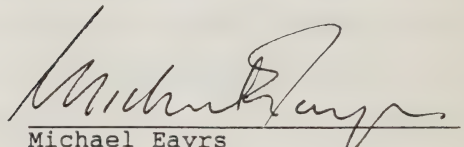
The Court went on to say:

*"... A complainant is entitled to the advantage and is subject to the limitation of the ninety day period under s.187(2) (now s.97(2)). It can neither be restricted to a lesser period by any direction of the Board nor be allowed a greater period."*

(pages 915; 34; and 44)

Mr. O'Connor had his 90 days to file his complaint back in 1987 and for whatever reason he did not take advantage of it. He cannot now be allowed further time to resurrect his complaint. The complaint is dismissed accordingly.

The foregoing is a unanimous decision of the Board.

  
\_\_\_\_\_  
Hugh R. Jamieson  
Vice-Chair  
\_\_\_\_\_  
Calvin B. Davis  
Member  
\_\_\_\_\_  
Michael Eayrs  
Member

DATED at Ottawa this 3rd day of May, 1991.

# Information

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## Résumé de Décision

Syndicat démocratique des employés de Banque de la région Saguenay Lac St-Jean (CSD), requérant, et Banque Nationale du Canada, Jonquière-Kénogami, employeur intimé.

Dossier du Conseil: 555-3122

N° de Décision: 872

A la suite de la présentation d'une demande d'accréditation pour représenter tous les employés de deux succursales de la banque, l'employeur s'est opposé à ce que les employés temporaires et la secrétaire du directeur des comptes commerciaux soient inclus dans l'unité de négociation.

Le Conseil a décidé que ces employés devaient faire partie de l'unité générale de négociation. En particulier, le Conseil a constaté que la nature et les modalités d'exécution des fonctions des employés temporaires, de même que leur niveau d'intégration aux opérations normales et habituelles de l'entreprise établissaient une communauté d'intérêts justifiant cette décision.

## Summary

The Syndicat démocratique des employés de Banque de la région Saguenay Lac St-Jean (CSD), applicant, and the National Bank of Canada, Jonquière-Kénogami, respondent employer.

Board File: 555-3122

Decision No.: 872

Following the filing of an application for certification covering all employees of two bank branches, the employer objected to the inclusion of the temporary employees and of the secretary to the manager, business accounts, in the bargaining unit.

The Board determined that the employees involved should belong to the main bargaining unit. Specifically, the Board concluded that the nature of the tasks performed, the manner in which the temporary employees perform these tasks, and their degree of integration in the bank's normal and regular operations established a community of interests justifying this decision.



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Reasons for decision

Syndicat démocratique des  
employés de banque de la région  
Saguenay-Lac St-Jean (CSD),

*applicant,*

*and*

National Bank of Canada,  
Jonquière-Kénogami,

*respondent employer.*

Board File: 555-3122

---

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Evelyn Bourassa and Ms. Ginette Gosselin, Members.

Appearances

Mr. Peter Bradley, for the union, accompanied by Mr. Daniel St-Gelais, union adviser, and Ms. France Gauthier, union president; and

Mr. John A. Coleman, for the respondent employer, accompanied by Mr. Louis Girard, manager, National Bank, Jonquière, and Ms. Danielle Doucet-Vincent, manager, employee relations, National Bank, Montréal.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The Proceedings

On April 18, 1990, the Board received an application for certification from the Syndicat démocratique des employés de banque de la région Saguenay-Lac St-Jean (CSD) to represent all employees of the National Bank of Canada working at the branches located at 3880 Harvey boulevard, Jonquière, and 3799 Roi-Georges Street, Kénogami. The employer objected to the description of the proposed

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Reasons for decision

Syndicat démocratique des  
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*and*

National Bank of Canada,  
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Board File: 555-3122

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I

The Proceedings

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bargaining unit and the inclusion in said unit of certain employee categories.

After exchanging information, the parties agreed on a number of issues. However, they were unable to agree on the following: whether the so-called "casual" employees and secretary to the commercial account manager should be included in the bargaining unit. On August 20, 1990, the Board rendered an interim decision under section 20(1) of the Code and certified the union to represent the following group of employees:

*"all employees of the National Bank of Canada working at its branch located at 3880 Harvey Boulevard East in Jonquière and at its satellite branch located at 3799 Roi-Georges Street, in Kénogami, excluding the positions of: manager, satellite branch manager, associate branch managers, assistant manager - administration, assistant branch managers, head - discount, assistants to branch managers, internal auditor, customer service supervisor, supervisor - administration, intermediate secretary (secretary to the manager) and account manager."*

As the Board stated, it reserved the right to amend the description of this bargaining unit after hearing the parties on the question of the exclusions. A public hearing was held in Chicoutimi on January 29 and 30, 1991. These reasons deal with issues that remain unresolved.

## II

### The Facts

The employer called one witness, the assistant manager - administration at the Jonquière branch, and the union called six witnesses, all bank employees.

### The inclusion of the so-called "casual" employees

In its written submissions, the employer objected to the inclusion in the bargaining unit of the employees that it

termed casual, on the ground that these employees did not have a sufficient community of interest with the other employees to belong to the same bargaining unit. In support of its objection, the employer relied on past Board decisions on the inclusion of this employee category in general bargaining units in the banking industry. The union, for its part, argued that these employees had a community of interest with the other regular employees and asked that they be included in the bargaining unit.

According to the documentary evidence produced by the bank at the hearing, the employer's business comprises three employee categories: regular full-time employees, regular part-time employees, and temporary employees. There is no reference to the concept of casual employee. The employer's use of the term casual in its written submissions refers in fact to the concept of temporary employee used in bank documents. For this reason, the Board adopted the term temporary employee rather than casual employee.

The state of the matter, as revealed by the evidence, is as follows.

1. The two branches in question provide a range of services to customers. Business hours are from 10:00 a.m. to 3:00 p.m. from Monday to Wednesday, 10:00 a.m. to 8:00 p.m. on Thursday, and 10:00 a.m. to 6:00 p.m. on Friday. The Jonquière branch is located in a shopping centre, which means that it is especially busy on Thursdays and Fridays.
2. On April 18, 1990, five temporary employees were employed at the Jonquière branch, all as customer service representatives, in which capacity they performed a variety of duties, some more complex than others. There were no temporary employees at the Kénogami branch.

3. When the application for certification was filed, the two branches had a total of 74 employees. Of that number, 55 employees, including the 5 temporary employees, are covered by the application. In addition to the 5 temporary employees, 8 regular full-time employees (1 vacancy) and 13 regular part-time employees (2 vacancies) were employed, at the time of the application, as customer service representatives.

The number of temporary employees at the Jonquière branch ranges from 1 to 10, depending on needs. During the period from 1985-86 until the beginning of 1991, this number ranged on average from 3 to 5.

4. Temporary employees meet certain needs: they replace regular employees who are absent on maternity leave, leave without pay, sick leave or for any other reason sanctioned by the bank. The bank also uses temporary personnel to handle the regular end-of-month extra workload or to fill a vacancy during the period it is posted.

5. Temporary employees are recruited and assigned to a specific position under a replacement procedure used by the employer. It was described as follows. When there is a temporary vacancy, it is first offered to the branch's regular personnel. Depending on the characteristics of the position (salary level, responsibilities, full-time or part-time), the number of regular employees who express an interest in filling this position can create a rather lengthy succession of temporary vacancies. In practice, the most junior position in this succession is very likely to be a part-time position as a customer service representative. However, this does not mean that the original temporary vacancy is a customer service representative

position even if the majority of temporary employees are assigned to such positions when they are hired. Although temporary employees generally occupy part-time positions, they sometimes fill full-time positions, if the final position to be filled in the succession of vacancies is a full-time position.

6. Regular full-time personnel work 37.5 hours a week. Regular part-time personnel work 15, 20, 22.5 or 30 hours a week, as the case may be. When temporary employees are hired to fill a part-time position, their weekly hours of work are generally 15 hours. The days they work during a week and the number of hours they work per day are predetermined. They are not on call.

However, daily and weekly hours of work of regular part-time employees can vary depending on operational requirements. Changes normally entail increased hours. This rule applies to temporary employees.

7. A newly hired temporary employee is assigned to a specific position. However, he or she may be required to perform other duties, depending on operational requirements. A temporary employee may occupy successively several positions during the course of his or her employment. For example, the evidence revealed that duties assigned initially were modified during the course of employment. Given this method of operation, temporary employees are sometimes employed by the bank for several months. In April 1990, the temporary employees in the bank's employ had been working for periods of from one to ten months.

8. The benefits and working conditions of National Bank of Canada employees are set down in a series of documents entitled "Permanent Instructions." Each document deals with

a specific subject, for example, credit policy, insurance or disability plans, vacation policy and training programs. The benefits and working conditions of employees vary according to their status. As a rule, these benefits and conditions are the same for both regular full-time and part-time employees, although they may be applied differently. Some of these benefits and working conditions do not apply to temporary employees (e.g. credit policy, dental insurance plan, health insurance plan, in-house training and development program), while others do, based on criteria specific to each employee category. In this regard, the leave policy sets out the terms and conditions governing statutory holidays, bereavement leave involving members of the immediate family and reimbursement of related salary. Temporary employees are also eligible for maternity leave or leave without pay for the care of children and court leave in a proceeding that is not work-related. They qualify, in certain cases, for short-term disability in case of illness, death benefits and accident insurance covering injury. The concept of continuous service applies to temporary employees and determines eligibility for some of the above-mentioned benefits. The formal rules of performance evaluation do not apply to temporary employees. Provision, however, is made to evaluate them at the end of their term of employment to enable the bank to decide whether it will rehire them.

Inclusion of the position of secretary to the commercial account manager

The incumbent of this position divides her time equally between the commercial banking and branch operations sectors. The manager of the commercial loan subcentre, which is located in Jonquière and which is not covered by the application for certification, is in charge of the commercial banking sector and the manager of the Jonquière

branch oversees the branch operations sector. The incumbent works at the Jonquière branch and is paid by that branch.

The incumbent performs the normal and customary secretarial work which is, however, adapted to meet the needs of the commercial banking and branch operations sectors. She also carries out some of the duties of a customer service representative every two or three weeks, in rotation with the other secretaries. She typed the performance evaluation of the assistant manager - branch operations. To her knowledge, other secretaries do this work for their immediate superiors.

### III

#### Decision

The Board has developed its policy concerning the inclusion of different employee categories in the same bargaining unit as so-called "regular" employees in numerous past decisions. This policy is especially well-defined in the banking industry where, as in other industries, it has undergone a definite change. While it can generally be said that the basic rules and principles remain the same, their interpretation and application have been refined and adapted to the realities of the labour market (see Canadian Imperial Bank of Commerce, Simcoe, Ontario (1977), 21 di 462; [1977] 2 Can LRBR 137; and 77 CLLC 16,091 (CLRB no. 92); Bank of Montreal (Cloverdale Branch) (1977), 23 di 92; and [1978] 1 Can LRBR 148 (CLRB no. 105); Canadian Imperial Bank of Commerce (Victory Square Branch) (1977), 25 di 355; [1978] 1 Can LRBR 132; and 78 CLLC 16,120 (CLRB no. 104); and Bank of Montreal, Sherbrooke, Quebec (1987), 69 di 102; 19 CLRBR (NS) 112; and 87 CLLC 16,044 (CLRB no. 621)).

In the instant case, the Board has concluded that the extent to which the temporary employees are integrated into the bank's normal and customary operations warrants their inclusion in the bargaining unit. They reflect the concept of part-time employees as developed in past Board decisions more than they do the concept of casual employees. In Bank of Montreal, Sherbrooke, supra, the Board, after reviewing the conclusions of the Wallace Report (J. Wallace, Part-Time Work in Canada: Report of the Commission of Inquiry into Part-Time Work (Ottawa: Labour Canada, 1983)), outlined its approach to this question in the following terms:

*"In the Board's view, genuine casual employees do not share a sufficient community of interest with the other employees to include them in the same bargaining unit as regular employees and part-time employees.*

*What is a genuine casual employee? In the notion of casual work, there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable, only part-time work is automatically created: the employee is not a casual worker but a part-time one. Moreover, as soon as an employee's availability is guaranteed and assured, a part-time job is automatically created.*

*Casual employment is therefore the product of a given employer's unforeseen need to have work performed and the chance, random and voluntary availability of a given employee. Some examples will illustrate this point.*

*An employer who decides to have the work of its employees performed, during their absence on vacation, by additional employees and who offers positions to persons willing to perform work for the entire vacation period for this reason is, in the Board's view, offering part-time employment. The employer's need was foreseeable, it foresaw the need, and it seeks applicants who will guarantee it that they will be available for a series of clearly specified work periods.*

*The potential employee who approaches an employer and guarantees it that he/she will be available at any time to perform any work made necessary by the absence of regular employees is not a casual employee, but a part-time employee. The potential employee who declares that he/she is available every Saturday to perform work in a bank branch in a shopping centre is not a casual employee, but a part-time employee.*

There is therefore the added element of regularity which the Board took into account in order to differentiate part-time work from casual work and, in this regard, it comes close to the Statistics Canada definition quoted above.

(pages 108-109; 118-119; and 14,335; emphasis added)

This definition of casual employee does not reflect reality or the conditions under which the temporary employees at issue here perform their work. These employees are hired by the bank to fill vacancies created by specific needs: maternity leave, leave without pay, sick leave. They carry out the same work as regular employees, although they do not always perform all the duties of a position. The temporary employees work according to a predetermined schedule, regularly and continuously, although for varying periods of time. The five temporary employees in question had been working from one to ten months as of April 1990. The other regular employees who testified before the Board at one time occupied temporary positions for periods of three or four months, and even as long as eleven months in one case, before becoming regular employees. They worked as temporary employees regularly and for predetermined periods of time, as the temporary employees were doing in April 1990 (regarding the application of the criteria of regularity and frequency of the employment in question, see Canadian Imperial Bank of Commerce, Simcoe, supra, and Quebec Mover's Traffic Consultants Inc. et al. (1981), 45 di 111 (CLRB no. 326)).

The Board has no authority to examine the employer's personnel administration policies or its methods of determining terms and conditions of employment or the number and titles of the employee categories it chooses to use to operate its business. It is, however, responsible for examining and evaluating the practical and concrete

conditions governing the performance of work by temporary employees, in order to determine whether there is a community of interest that would warrant a single bargaining unit. In that sense, the fact that there are different terms and conditions of employment and benefits for this employee category must not be a determining factor in deciding the matter at issue because this distinction exists solely because of the employer's decision. This is not to say, however, that these differences must be ignored in deciding whether there is a community of interest. In our opinion, however, they cannot constitute the determining factor. The true test is rather the extent to which the employees are integrated into the normal and customary operations of the business. Regularity and frequency of employment are a better gauge of community of interest than continuity or permanence per se or reference to employment status. In Ghislain Otis et al. (1987), 72 di 7; 19 CLRBR (NS) 16; and 88 CLLC 16,004 (CLRBR no. 657), the Board said the following:

*"For a number of years, the Board has excluded casual employees from bargaining units. Moreover, it has done so in the case of bargaining units comprising bank employees. The principal reason for excluding this employee category was that casuals had no community of interests with other employees.*

*Moreover, generally speaking, this was the only employee category that the Board excluded. The case law of this Board reveals that it has developed a policy concerning employees who do not work a regular workweek, i.e. that they are included in bargaining units."*

(pages 19; 28; and 14,0017; emphasis added)

In Bank of Montreal, Sherbrooke, supra, the Board repeated in these terms the principle enunciated earlier:

*"Previous decisions of this Board reveal that, for some years now, it has generally been integrating part-time employees in the same bargaining units comprising full-time employees."*

(pages 106; 117; and 14,334)

In its arguments, the employer urged the Board not to intervene in a matter that was more properly dealt with through collective bargaining, i.e. the inclusion of certain categories of employees whose status should be the subject of negotiation between the parties. The Board does not believe that determining the status of an employee and whether or not this employee should be included in the bargaining unit are in themselves subjects for collective bargaining. On the contrary, defining what constitutes a unit appropriate for collective bargaining is the Board's responsibility. In this regard, the Board, in determining which employee categories are part of the bargaining unit, must seek in particular to promote industrial peace and establish sound labour relations. These criteria require that persons who share a community of interest be included in the same unit. Once the Board has established the framework for collective bargaining, the parties will negotiate the terms and conditions of employment that apply to these employees, including, if they see fit, the terms and conditions governing the organization and allocation of work among the various employee categories.

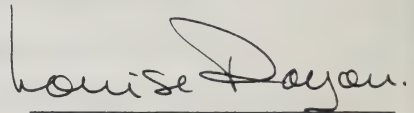
Having examined the evidence and arguments, the Board finds that, because of the nature of their duties and the terms and conditions under which they perform them, the temporary employees whom the employer seeks to exclude should be included in the bargaining unit.

With regard to the position of secretary to the commercial account manager, the Board decides to include it in the bargaining unit. This position does not require the performance of any duties of a confidential nature in matters relating to industrial relations and the general

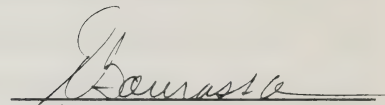
nature of the duties of this position warrants its inclusion.

Accordingly, the wording of the certification order issued on August 20, 1990 shall remain the same.

This is a unanimous decision.



Louise Doyon  
Vice-Chair



Evelyn Bourassa  
Member of the Board



Ginette Gosselin  
Member of the Board

ISSUED at Ottawa, this 9th day of May 1991.

# information

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## Summary

ELEANOR HASLE, EMPLOYEE, AIRLINE  
DIVISION, CANADIAN UNION OF PUBLIC  
EMPLOYEES, BARGAINING AGENT, AND  
CANADIAN AIRLINES INTERNATIONAL LTD.,  
EMPLOYER.

Board File: 950-191

Decision No.: 873

These reasons deal with a referral of  
a safety officer's decision to the  
Board pursuant to section 129(5) of  
the safety and health provisions under  
part II of the Code.

The circumstances giving rise to the  
referral occurred on April 5, 1991  
when Eleanor Hasle refused to work a  
flight from Toronto to Lima, Peru,  
because of concerns for her safety and  
health. Ms. Hasle claimed that she  
was in danger of catching cholera  
which exists in epidemic proportions  
in Peru and that the possibility of  
violent crimes or terrorist activity  
made Lima a dangerous destination or  
a dangerous place for the crew to  
layover. Complaints of danger also  
stemmed from the alleged lack of  
security at the hotel in Lima where  
the crew stayed.

Following an investigation into the  
refusal, a safety officer ruled that  
there was no danger within the meaning  
of the Code at Lima.

After hearing the parties at Toronto  
on May 1 and 2, 1991, the Board  
confirmed the safety officer's  
decision.

Ce document n'est pas officiel.  
Seuls les Motifs de décision  
peuvent être utilisés à des fins  
juridiques.

## Résumé de Décision

ELEANOR HASLE, EMPLOYÉE, LA DIVISION  
DU TRANSPORT AÉRIEN DU SYNDICAT  
CANADIEN DE LA FONCTION PUBLIQUE,  
AGENT NÉGOCIATEUR, ET LES LIGNES  
AÉRIENNES CANADIEN INTERNATIONAL LTÉE,  
EMPLOYEUR.

Dossier du Conseil: 950-191

N° de Décision: 873

Les présents motifs traitent du renvoi  
au Conseil d'une décision d'un agent  
de sécurité aux termes du paragraphe  
129(5) du Code canadien du travail  
(Partie II - Sécurité et santé au  
travail).

L'incident qui a donné lieu au renvoi  
s'est produit le 5 avril 1991  
lorsqu'Eleanor Hasle a refusé une  
affectation de Toronto à Lima, au  
Pérou, pour des raisons de santé et  
de sécurité. Mme Hasle prétend  
qu'elle risquait de contracter le  
choléra, qui atteint des proportions  
épidémiques au Pérou, et que la  
possibilité de violence et d'activités  
terroristes faisaient de Lima une  
ville dangereuse pour l'équipage qui  
devait y faire escale. Les plaintes  
de danger découlaient également du  
prétendu manque de sécurité à l'hôtel  
où logeait l'équipage.

À la suite d'une enquête sur le refus,  
un agent de sécurité a décidé qu'il  
n'y avait pas à Lima de danger au sens  
où l'entend le Code.

Après avoir entendu les parties à  
Toronto les 1<sup>er</sup> et 2 mai 1991, le  
Conseil a confirmé la décision de  
l'agent de sécurité.



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Reasons for decision

Eleanor Hasle,  
employee,  
Airline Division, Canadian Union  
of Public Employees,  
bargaining agent,  
and  
Canadian Airlines International  
Ltd.,  
employer.  
Board File: 950-191

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The Board was composed of Vice-Chair Hugh R. Jamieson sitting as a single member quorum pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Beverly J. Burns for Eleanor Hasle and the Airline Division, Canadian Union of Public Employees; and  
Harry Freedman for Canadian Airlines International Ltd.

I

This is a referral of a safety officer's decision under section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health):

*"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of*

*receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."*

The circumstances giving rise to the referral occurred at Pearson International Airport, Toronto, on April 5, 1991 when Eleanor Hasle, who is employed as a flight attendant with Canadian Airlines International Ltd. (CAIL or the employer), refused to work a flight to Lima, Peru, because of her concern for her safety and health. This concern was based on several factors which can be summarized as: insecure hotel accommodation, exposure to a cholera epidemic, a threat of terrorist activity, and the prevalence of crime and violence in the area.

The refusal took place about 5:10 p.m. on April 5 when Ms. Hasle and another flight attendant, Tracy Leyden, exercised their right to refuse which is contained in section 128(1) of the Code:

*"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that*

*(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or*

*(b) a condition exists in any place that constitutes a danger to the employee,*

*the employee may refuse to use or operate the machine or thing or to work in that place."*

*(emphasis added)*

Following discussions with representatives of the employer, which also involved representatives of the Airline Division, Canadian Union of Public Employees

(CUPE or the union), Ms. Leyden withdrew her refusal and agreed to work the flight. Her decision to discontinue her refusal was contributed to a change in hotel accommodation at Lima which the employer had just arranged. Ms. Hasle, who claimed that she was not told of the new accommodation arrangements, continued with her refusal. Her place on the crew was taken over by a reserve flight attendant who agreed to take the flight after being informed of the circumstances surrounding the refusal.

In accordance with section 129(1) of the Code, a safety officer was notified and attended at the scene. After discussions with the parties, the safety officer, Mr. Jean Maurice Pigeon, ruled verbally that there was no danger within the meaning of Part II of the Code. This ruling was later confirmed by a written report dated April 15, 1991. Mr. Pigeon's decision was set out on pages 5 and 6 of the report:

"Decision

*After investigating and considering that:*

- 1. The hotel is not a work place controlled by the employer.*
- 2. The potential for theft against crew members is a criminal matter and thus not governed by Part II of the Canada Labour Code.*
- 3. The potential for terrorist activity is a criminal matter not a health and safety matter and therefore is not legislated by Part II of the Canada Labour Code.*
- 4. The transmission of cholera occurs only through the ingestion of faecally contaminated water or food. Safe bottled water is provided by the airline for crew members. Food prepared for crew and passengers aboard flight is cooked post core temperature of 70 degrees celsius at which bacterium causing cholera is destroyed.*
- 5. The Pan American Health Organization states that the cholera vaccine is not recommended for either personal protection or for the prevention or control of outbreaks. This*

information was made known in company documentation.

6. *The risk of contracting cholera is directly related to disregarding precautions outlined in safety bulletins and is not in relation to the numbers already afflicted. (see attached documents).*
7. *The cholera epidemic has existed since late January and in spite of regular flights in and out of Lima since that time no crew member has contracted cholera.*

*I conclude the inexistence of danger."*

Ms. Hasle's request that the foregoing decision be referred to the Board was by letter dated April 16, 1991. The actual referral from the safety officer was received by the Board on April 19, 1991 and, in keeping with the Board's policy of dealing with section 129(5) referrals as expeditiously as circumstances permit, the matter was heard at Toronto on May 1 and 2, 1991.

## II

The flight that Ms. Hasle refused to work is the first leg of an eight (8) day duty schedule in South America. This flight which leaves Toronto at 6:00 p.m. stops at Mexico City and arrives at Lima about 5:05 a.m. local time. The flight attendant crew (the crew) then has a twelve (12) hour layover at Lima before deadheading on an American Airlines (A/A) flight to Santiago. This flight leaves Lima at 6:15 p.m. arriving at Santiago at 11:40 p.m. After a layover of some fifteen (15) hours at Santiago the crew again deadheads on an A/A flight leaving at 2:55 p.m. arriving Buenos Aires at 5:42 p.m. Another layover of some sixteen (16) hours at Buenos Aires precedes a working flight of two (2) hours to Santiago. There, the crew has a day room at its

disposal until the return flight to Buenos Aires which leaves at 5:30 p.m. arriving at Santiago at 8:15 p.m. Following a layover of some 45 hours at Buenos Aires the crew deadheads back to Lima on a Peruvian airline. This flight leaves Santiago at 10:45 p.m. arriving at Lima at 00:15 a.m. The crew is now ending its sixth (6th) day of the duty schedule and the layover is twenty-nine (29) hours at Lima. The schedule ends with the return flight to Toronto with a stop at Mexico City.

Prior to the change in hotel accommodation which I referred to earlier, the crew stayed at the El Pardo hotel during the Lima layovers. This has been a bone of contention between the union and CAIL since at least July 1990. Flight Attendants have complained constantly about the hotel facilities. Security seemed to be the biggest concern with flight attendants complaining about the lack of security bolts on hotel room doors and adjoining room doors which were not locked. Inability to sleep was another problem caused by outside noises and the flimsy or non-existent sound-proofing in the hotel's construction. The local crime scene was also high on the priority of complaints and crews complained that they could not leave the hotel except in groups and then only during daylight hours. All of these things contributed to an extremely tense atmosphere in which the flight attendants claimed they were unable to get proper rest.

To make matters worse, a recent outbreak of cholera in Peru caused further concerns for the CAIL crews laying over at Lima and, what I will describe as the culminating incident occurred about March 30, 1991 when a flight attendant was abducted and mugged at gunpoint

in broad daylight within a few blocks of the El Pardo hotel. This incident which came on top of the cholera scare prompted the union to request a meeting with the employer to resolve the controversial Lima layover problem once and for all. There had been an ongoing exchange between the union and CAIL on this topic. As far back as September, 1990, the union's System Hotel and Accommodation Committee (SHAC) had written to the employer outlining its concerns for the safety and health of the flight attendants. Early in 1990, the union's Safety and Health Committee members became involved as flight attendants began inquiring about vaccines and other preventative measures as the cholera epidemic caught the attention of the media.

CUPE was not the only trade union involved in the problems with Lima layovers. Pilots were also voicing their concerns through their bargaining agent, the Canadian Air Line Pilots Association (CALPA). Some time in March 1991 an agreement was reached between CAIL and CALPA whereby the pilots agreed to extend their daily duty hours to avoid the Lima layover. Pilots now bring the equipment back to Mexico City where they layover.

Alternatives to Lima layovers were also offered to CUPE but the union refused to have anything to do with an extended duty day. Under the CUPE collective agreement, the maximum duty day is fourteen (14) hours. This can be extended with the agreement of the union to sixteen (16) hours for the purposes of deadheading to home base or for positioning following the termination of flight duty. The collective agreement also provides that this agreement by the union shall not be unreasonably withheld.

Just as it had done with CALPA, CAIL suggested that CUPE come up with a pairing schedule that could meet its flight scheduling commitments and, at the same time, eliminate the need for the Lima layovers. In fact, on April 4, 1991, the very day before the refusal by Ms. Hasle, while CUPE representatives were meeting with CAIL people at Toronto to attempt to resolve this issue, another CUPE team was meeting with the employers' crew scheduling group at Vancouver to attempt to find a pairing solution. The union people could not come up with a resolution to the pairing schedule problem.

CAIL did have a few suggestions, one of which would have avoided the need to layover at Lima and it would also have eliminated the need to deadhead on the A/A flights as well as the Peruvian airline. Some flight attendants had expressed some concern for the safety of the latter airline's operations. This alternative would have involved flight attendants deadheading direct from Toronto to Buenos Aires for the Buenos Aires-Santiago shuttle flight. After working the flight, they would deadhead back to Toronto. On the way south, the flight attendants would travel guaranteed "J" class which is business class and, on the return flight to Toronto they would fly economy with upgrading to "J" class on a space available basis.

CUPE refused to accept this proposal which would have eliminated the need for its members to layover at Lima.

The fact that duty hours would have exceeded the maximum fourteen (14) hours by fifty (50) minutes and thirty-five (35) minutes respectively on the two days which required deadheading to Buenos Aires and the return trip to Toronto was totally unacceptable to CUPE. The union was adamant when they appeared before me that they would not entertain this proposal as it meant replacing one dangerous situation with another. According to the union, the crew would be too fatigued to work the two-hour flight from Buenos Aires to Santiago after deadheading for ten hours from Toronto. The union also had a problem with the crew working the return flight from Santiago to Buenos Aires and then deadheading to Toronto.

There was, however, one positive result from the April 4, 1991 meeting between the parties. CAIL agreed to change the hotel accommodation. This was reflected in a memo of April 8, 1991:

*"This letter shall serve to clarify our meeting held on April 04, 1991, wherein we have agreed to change the crew hotel from the El Pardo to the Caesar Hotel, as a temporary measure only, until such time as the parties have had an opportunity to discuss alternate pairings to Lima layovers."*

While the foregoing mentions the change as a temporary measure, a later memo dated April 12, 1991, does set out the employer's intention to continue to use the Caesar Hotel:

*"Notwithstanding the preceding, we will continue indefinitely to overnight our crews at the Caesar Hotel in Lima, given the abundance of feedback from crews operating those flights."*

In any event, getting back to the sequence of events, during the evening of April 4, 1991 after the meeting with CAIL, members of SHAC contacted flight attendants who were scheduled to work the Lima flight on April 5, 1991. Eleanor Hasle said she got a call and was told about the recent abduction of a flight attendant and was cautioned to stay inside the hotel unless accompanied by a group. Ms. Hasle said that she had been in Lima in early February and she was particularly uneasy then about the El Pardo hotel and the possibility of violence against her. She had also made inquiries about a vaccine for cholera but she had seen a company notice advising against it. This latest incidence of violence worried her so she contacted the union's safety and health people who advised her about her right to refuse under Part II. According to Ms. Hasle, she struggled with the problem all day on the 5th and only decided to exercise her right to refuse when she reported for work that evening.

### III

The Board's power to deal with referrals under section 129(5) of the Code lies in section 130(1):

*"130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*

*(a) confirm the decision; or*

*(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."*

Clearly, the Board's role is similar to that of the safety officer who inquired into the circumstances of the refusal in the first place in that the question to be answered is whether danger existed or not. Keeping in mind that referrals only come to the Board where there has been a finding of no danger, the Board's options are simply to either agree with that decision and confirm it, or find that danger exists and issue whatever direction is appropriate in the circumstances to rectify the situation. In this regard, the Board has the same powers as the safety officer under section 145(2) of the Code.

The starting point is, of course, the concerns of the employee who exercised the right to refuse. In this particular referral these concerns are listed in the refusal to work registration form which was signed by Ms. Hasle prior to the safety officer commencing the investigation on April 5, 1991:

*"As far as I know Lima is an unsafe destination or layover destination. There was a flight attendant robbed at gunpoint last week. There is a cholera epidemic right now. The company knows its unsafe as they have put an armed guard on the bus to take us to the hotel (from the airport). More time in Lima than originally scheduled."*

This reference to "more time" in Lima went to the fact that the layover at Lima on the return leg from Buenos Aires had recently been extended to twenty-nine (29) hours. This was caused by the cancellation of the A/A flight which the crew deadheaded on and the change to the Peruvian airline flight necessitated a longer stay at Lima. This did not go down well with the union

of course because of their ongoing battle to avoid Lima and here was the employer extending the layover.

Turning to the safety officer's response to Ms. Hasle's specific concerns which were threefold, I cannot see anything in the submissions of either Ms. Hasle or of the union which would cause me to upset his findings. Understandably this is a very emotional situation for the flight attendants and this was reflected in the unforgiving attitude of the union people that I encountered at the hearing. However, having said that, I should point out for what it is worth that in spite of the insinuations that the union was the catalyst for the refusals, I have no doubt that Ms. Hasle acted in good faith and that her refusal was not unreasonable in the circumstances. The fact that the union jumped on the bandwagon to attempt to resolve its own differences with CAIL through this forum does not detract from the obvious sincerity of Ms. Hasle.

Let me start with the allegations of the inadequacy of security at the El Pardo Hotel. Much was said in this regard but I have to point out that this matter had been resolved at the time of the refusal. By then, arrangements had been made for the crew to stay at the Caesar Hotel which was the choice of SHAC, the union's own committee. Although Ms. Hasle says that she was not told about the change in hotel accommodation on the 5th of April, the fact remains that this perceived source of danger was no longer an issue and I need not address it. Nor do I need to deal with whether the hotel accommodation at Lima can be found to be a workplace within the meaning of Part II of the Code.

The purported danger from potential criminal or terrorist activities were dealt with separately by the safety officer but I will lump them together. On this topic CAIL relied on a previous decision of the Board, David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRBR no. 686) in support of its position that this is not the type of danger contemplated by the Code. In that case, a bus driver refused to drive El Al Israel Airlines crews to and from the Pearson International Airport and downtown Toronto because of the possibility of terrorist attacks as well as for a fear of an accidental discharge of the weapons carried by police escorts. There the Board ruled that a remote possibility of danger such as terrorist attacks does not fall within the meaning of danger for the purposes of the right to refuse under Part II of the Code. In the circumstances here, CUPE argued that the chances of criminal violence or terrorist activity are more of a reality at Lima than it was at downtown Toronto in the Pratt case. However, in my respectful opinion this is not the issue, it is whether the danger (if it is danger within the meaning of the Code) at Lima is so immediate and acute that CAIL has to suspend layovers until the source or cause of danger is rectified or removed.

In the circumstances and given all of the normal precautions that all travellers should take when visiting places like Lima, I cannot find that the danger from criminal or terrorist activity is so acute that CAIL should be directed to suspend crew layovers at Lima. I say this giving CUPE the best possible scenario and without ruling whether riding in a bus from the airport to a hotel or strolling around downtown Lima can

be said to be "working in a place" as envisaged by section 128(1) of the Code.

I would rule the same with regard to the danger of contracting cholera. I listened with interest and have read the material on cholera with care, including the bulletins issued by CAIL describing the precautionary measures that crews have been advised to take. It seems to me that, despite the epidemic proportions of the disease at Peru, this purported source of danger is reduced to a minimum if everyone heeds the advice. Certainly, no CAIL employee has gone down with cholera to date. Admittedly, the precautions are extreme and probably irritating and, they can only add to the discomfort and anxiety of the flight attendants who have to layover at Lima. But, these precautions are preventative measures against danger, not a source of danger.

Taking everything into consideration I agree with the bottom line of the safety officer's decision that danger within the meaning of the Code did not exist as far as Ms. Hasle's employment obligations were concerned on April 5, 1991. I therefore confirm the safety officer's decision to that extent.

Before closing I would, however, reiterate what was said in David Pratt, supra:

"...I should add that, because a safety officer or the Board finds that there is no immediate danger to an employee and that the operation can resume, it does not mean that danger in the strict sense of the word does not exist at all. There may still be reason enough for the circumstances to be investigated further through the safety and health committees or representatives with a

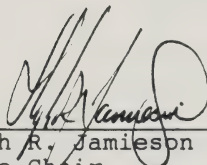
*view to reducing the risk of injury or illness, or for instigating a study into the long-term effects of the hazard or condition that caused the employee's anxiety in the first place."*

(pages 226 and 318; emphasis added)

For anyone to suggest that danger in the strict sense of the word does not exist at Lima would be absurd. Of course there is danger and who knows what long-term effect the anxiety and lack of proper rest this experience will have on these flight attendants. From what I heard though, CAIL appears to be approaching this problem responsibly as evidenced in its dealings with the pilots and the other measures that have been taken to ease tensions and reduce exposure to danger. The change in hotel accommodation is but one example of the employer's willingness to respond to the concerns of the employees. CAIL also put forward at least one workable alternative to remove the need for layovers at Lima.

Not knowing enough about the complexities of crew pairings and flight scheduling to offer a solution of my own, I would implore the parties to resume their efforts to find a mutual resolution to this problem through non-adversarial and co-operative consultation. It seems to me that a solution is not out of reach and, while I can appreciate CUPE's desire to protect the all important fourteen (14) hour duty day, I would urge the union to be a little more flexible considering the special circumstances of this case. If the proposal by CAIL to deadhead the crews from Toronto directly to Buenos Aires and back is the only solution left then CUPE should at least consider giving its members who

have to layover at Lima the opportunity to choose which of these two options they prefer, i.e., deadhead to and from Buenos Aires on a CAIL flight or, laying over at Lima.



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Hugh R. Jamieson  
Vice-Chair

DATED at Ottawa this 13th day of May, 1991.



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## Summary

NATIONAL ASSOCIATION OF BROADCAST  
EMPLOYEES AND TECHNICIANS,  
COMPLAINANT, ON BEHALF OF PAUL  
JAMES BARKHOUSE, AND DARTMOUTH  
CABLE TV LIMITED, RESPONDENT  
EMPLOYER.

Board File: 745-3717

Decision No.: 874

According to section 97(2) of the  
Canada Labour Code (Part I -  
Industrial Relations), the Board  
cannot entertain an unfair labour  
practice complaint unless it is  
filed within 90 days of the date of  
which the complainant knew, or in  
the opinion of the Board ought to  
have known, of the "action or  
circumstances" giving rise to the  
complaint.

In this case, the complainant knew  
that a person had been dismissed  
but was not aware, until some  
months later, of a significant  
piece of information which led the  
complainant to feel sure that the  
dismissal was an unfair labour  
practice and that a complaint might  
well be upheld by the Board. The  
complainant filed the complaint  
within 90 days of knowing of this  
important evidence and claimed that  
this satisfied section 97(2) and  
that the complaint was timely.

The Board decided that section  
97(2) means in effect that a  
complaint must be filed within 90  
days of the event that lies at its  
heart, not within 90 days of the  
complainant coming to an  
understanding of the real meaning  
of that event. The complaint was  
deemed to be untimely.

## Résumé de Décision

ASSOCIATION NATIONALE DES EMPLOYÉS  
ET TECHNICIENS EN RADIODIFFUSION,  
PLAIGNANTE, AU NOM DE PAUL JAMES  
BARKHOUSE, ET DARTMOUTH CABLE TV  
LIMITED, EMPLOYEUR INTIMÉ.

Dossier du Conseil: 745-3717

No de Décision: 874

Selon le paragraphe 97(2) du Code  
canadien du travail (Partie I -  
Relations du travail), le Conseil  
ne peut accueillir une plainte de  
pratique déloyale de travail si  
elle n'est pas déposée dans les 90  
jours suivant la date à laquelle le  
plaignant a eu, ou selon le Conseil  
aurait dû avoir, connaissance des  
«mesures ou des circonstances»  
ayant donné lieu à la plainte.

En l'instance, le plaignant savait  
qu'une personne avait été congédiée  
mais n'était pas conscient, et ne  
l'a été que quelques mois plus  
tard, de l'existence d'un  
renseignement important qui l'a  
amené à croire que le congédiement  
était une pratique déloyale de  
travail et qu'une plainte pourrait  
bien être maintenue par le Conseil.  
Le plaignant a déposé la plainte  
pendant la période de 90 jours  
suivant la prise de connaissance de  
cet élément de preuve important et  
a prétendu que cela répondait aux  
exigences du paragraphe 97(2) et  
que la plainte était donc  
recevable.

Le Conseil a décidé que le  
paragraphe 97(2) signifiait  
vraiment qu'une plainte doit être  
déposée dans les 90 jours suivant  
l'événement au coeur de la plainte,  
non dans les 90 jours suivant la  
compréhension de la signification  
réelle de l'événement par le  
plaignant. La plainte a été jugée  
irrecevable.



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Reasons for decision

National Association of  
Broadcast Employees and  
Technicians,

*complainant,*

on behalf of

Paul James Barkhouse,

and

Dartmouth Cable TV Limited,

*respondent employer.*

Board File: 745-3717

The Board consisted of Vice-Chairman Thomas M. Eberlee and  
Members Calvin B. Davis and Mary Rozenberg.

These reasons for decision were written by Vice-Chairman  
Eberlee.

Appearances:

Ronald A. Pink, for National Association of Broadcast  
Employees and Technicians and Paul James Barkhouse; and  
Peter McLellan, for Dartmouth Cable TV Limited.

I

The issue addressed in these reasons for decision is  
whether the unfair labour practice complaint by the  
National Association of Broadcast Employees and Technicians  
(NABET) on its own behalf and on behalf of Paul James  
Barkhouse was filed with the Board in a timely fashion.  
The complaint itself was that Dartmouth Cable TV Limited  
terminated Mr. Barkhouse's employment on January 4, 1990,  
contrary to sections 94(1)(a), 94(3)(a)(i) and (iii), and  
94(3)(e) of the Canada Labour Code (Part I - Industrial  
Relations), during NABET's effort to commence an organizing  
campaign among employees of the company. The complaint was  
filed with the Board on August 7, 1990.

Section 97(2) provides as follows:

*"97(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."*

NABET sought, at a hearing in Halifax on April 10, 1991, to have the Board conclude that they did not "know" of the real reason for the dismissal until June 26, 1990 and were not in a position to file a complaint until after that date. August 7, 1990 was within 90 days of June 26, 1990. Thus the complaint, in their view, was timely. Dartmouth Cable TV, on the other hand argued that the dismissal constituted the "action or circumstances giving rise to the complaint" and the August 7, 1990 date of filing was well beyond the requisite 90 days.

## II

Mr. Barkhouse began working full-time for Dartmouth Cable TV as an installer in 1985. In the late autumn of 1989, he began to be concerned about the prospect of lay-offs from the company. He approached Barney Dobbin, NABET's Atlantic regional director, about the possibility of union organization. Mr. Dobbin suggested that he enlist two fellow employees who might be interested and then the four of them would meet to discuss the question.

Following this initial contact, Mr. Barkhouse advised Mr. Dobbin that he had lined up two other employees for a meeting to talk about organizing the work force. A meeting was arranged for the evening of November 21, 1989. When Mr. Barkhouse and Mr. Dobbin arrived at the apartment of

one of the fellow employees where the meeting was to take place, that employee was absent. They then went to the residence of the second fellow employee who also was not at home. Mr. Dobbin told the Board he was concerned when both persons were unavailable. He feared that word of their proposed meeting had leaked out to the employer but Mr. Barkhouse assured him it could not have done, that the problem was simply one of scheduling. In any case, Mr. Barkhouse was not successful in bringing co-workers and Mr. Dobbin together during the remainder of 1989 and any further attempt to begin union organizing was postponed until the new year.

Meanwhile, on December 13, 1989 Mr. Barkhouse's boss, Pat Fogarty, called him to meet him (Fogarty) in the latter's truck at a location in the north end of Dartmouth. Mr. Barkhouse told the Board that he understood this meeting to be for the purpose of discussing and assessing his (Barkhouse's) work. During the meeting, Mr. Fogarty asked Mr. Barkhouse if he knew anything about rumours that were going around concerning a union trying to organize the employees. Mr. Barkhouse replied in the negative. Mr. Fogarty then said something to the effect that Mr. Barkhouse's reply was odd because he (Fogarty) had heard that Mr. Barkhouse was involved in the union matter. To this, according to Mr. Barkhouse, he replied that Mr. Fogarty's sources were wrong.

Mr. Barkhouse told the Board that he recalled other times when Mr. Fogarty had either asked if he knew anything about a union being interested in organizing or had expressed opinions about unions. He testified that he had heard Charles V. Keating, president of the company, express opposition to unions in speeches on several occasions. Mr. Barkhouse was convinced that Mr. Fogarty believed him on

December 13, 1989 when he said to Mr. Fogarty that he knew nothing about any union being interested in organizing employees. He did not report this part of his conversation with Mr. Fogarty to anybody, including Mr. Dobbin. His evidence was that he forgot all about it. All he could remember - until much later - about his meeting with Mr. Fogarty was that it involved an appraisal of his work and that the appraisal was favourable.

On January 2, 1990, Mr. Barkhouse was called into the office of Gregory J. Keating, Vice-President of Operations, and was asked if he was happy working for the company. He was told that he had "outgrown" the business and would be happier working somewhere else. Mr. Keating, or one of the other management people in attendance, asked for his resignation. According to Mr. Barkhouse, he was told that if he did not resign he would be dismissed. Nothing about a union or unions was mentioned and no further explanation was given for their demand for the resignation.

Mr. Barkhouse left this meeting without resigning - or being fired immediately - and called Barney Dobbin of NABET. The latter asked him if there was any reason given as to why they would fire him; Mr. Barkhouse replied that he couldn't figure out any reason. Mr. Dobbin asked if there had been any mention of a union but Mr. Barkhouse assured him the subject had not come up. Mr. Dobbin advised Mr. Barkhouse to reply to the company in writing and to refuse to resign.

A friend then helped Mr. Barkhouse to compose a letter to the employer. Before sending it, Mr. Barkhouse checked it out with Mr. Dobbin who suggested the inclusion of the third and fourth paragraphs. The letter is as follows:

"Mr. Paul Barkhouse  
236 Albro Lake Road  
Dartmouth NS

January 3, 1990

Mr. Greg Keating  
Dartmouth Cable Limited  
190 Victoria Road  
Dartmouth NS

Dear Mr. Keating

This refers to our conversation of January 2, 1990 where you instructed me to resign my employment with Dartmouth Cable.

I was astonished by this request, as I have been a faithful and hard working employee for nearly five years. At no time have I ever been disciplined or warned of shortcomings in my performance, or given you just cause for dismissal.

Under these circumstances, I can only assume that you have taken this action as a result of my efforts to look in to the advantages of representation by N.A.B.E.T. for Dartmouth Cable employees.

In such case, this constitutes an illegal action on your part which I will oppose through all legal means available to me.

To conclude, I believe I can continue to be an effective employee of your company and very much wish to do so.

Yours Truly

(signed)  
Paul Barkhouse"

Both Mr. Dobbin and Charles Shewfelt, a NABET national representative, testified that they had no knowledge until much later that an employer representative (Mr. Fogarty) had raised the subject of union activity with Mr. Barkhouse on December 13, 1989. Although they grilled Mr. Barkhouse intensively, he was unable to recall anything that could hint at the company having knowledge of a possible union organizing initiative. Mr. Barkhouse was convinced that the company's desire to get rid of him was based entirely on other factors.

However, Mr. Dobbin was suspicious of the company's motives in wanting Mr. Barkhouse to go. This was why he suggested the inclusion of the third and fourth paragraphs in Mr. Barkhouse's letter to the company. He felt that if Mr. Barkhouse mentioned NABET, and stated clearly that he had been attempting to organize for NABET, this would serve to alert the company to possible trouble and might well cause it to change its mind and retain Mr. Barkhouse in employment.

On or about January 4, 1990, the company went ahead and terminated Mr. Barkhouse by simply giving him a termination slip.

A few days later, Mr. Dobbin called Elizabeth Duncan, the company general manager, asked her to reconsider the firing, threatened to pursue the matter but got no indication from her that they had been aware of Mr. Barkhouse's organizing effort.

The union officers engaged in consultations with counsel and concluded they had insufficient evidence of a violation of section 94 of the Code and therefore were not justified in filing any complaint with the Board at that time. Instead, a complaint was made to Labour Canada that Mr. Barkhouse had been unjustly dismissed contrary to section 240 of the Code. They did not file a complaint alleging a violation of section 94 at the same time because they believed that they could not file under both sections.

Not until the unjust dismissal complaint was being heard by an adjudicator on June 26, 1990 did NABET hear for the first time that the company had been aware in December, 1989, of the abortive attempt by Mr. Barkhouse to organize

the union. General Manager Duncan testified at the hearing that the company knew, as did Mr. Fogarty. Moreover, Mr. Barkhouse, in his testimony at that hearing, also remembered finally that Mr. Fogarty had raised the subject during the December appraisal interview.

To add to the confusion, the Board heard testimony from Ms. Duncan that she heard Mr. Barkhouse tell the adjudicator under oath that he had advised Barney Dobbin when the January 3, 1990 letter was being composed that he had been asked about a union by Mr. Fogarty. Ms. Duncan produced her notes from the unjust dismissal hearing to substantiate this assertion. Mr. Barkhouse, in his testimony to the Board on April 10, 1991 was unable to remember this alleged part of his earlier testimony. Mr. Dobbin also could not recall specifically such testimony by Mr. Barkhouse, although he did recall that he had noticed something about what Mr. Barkhouse had said at the earlier hearing and "it didn't sit right ... it struck me as weird."

The Board heard expert testimony from psychologist Sharon F. Cruikshank that Mr. Barkhouse has a severe learning disability which makes it difficult for him to recall and connect events which other persons would more readily perceive as causes and effects. He has difficulty perceiving a logical sequence or order to past events and thus in appreciating their possible significance and in remembering them. This accounts for his failure to remember the Fogarty conversation until much later. Perhaps it also accounts for the testimony to the adjudicator which was quoted to the Board by Ms. Duncan.

III

Before getting into the question of precisely when the complainants "knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint", one point advanced by NABET needs to be dealt with. It is the assertion by counsel that the Canada Labour Code is quite clear that you cannot seek another remedy if you seek a remedy under section 240.

The Board's reading of the Canada Labour Code is that there is nothing in Part I which prevents somebody from complaining to the Board that a dismissal, for example, constitutes a breach of section 94 while at the same time filing a complaint with Labour Canada alleging that the dismissal is a violation of section 240 of Part III of the Code.

The only restrictions in the Code are those in Part III applying to section 240 complaints. In the first place, no unjust dismissal claim can be made where a collective agreement covers the complainant. And, in the second place, section 242(3.1)(b) bars the adjudicator from considering any complaint where "a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament". Often parties do file complaints concerning dismissals under both section 94 and section 240 and then make an election as to which provision has the greater applicability to the particular case and which will be pursued.

The two provisions are far from being similar in intent and effect. In the case of section 94(3)(a), for example, the dismissal may well have been warranted except that it was also motivated in some small part by an element of

"anti-union animus" - which puts it in violation of the section. On the other hand, under section 240, the adjudicator looks at the whole picture and determines on balance whether the dismissal was just or not. The element of anti-union animus is not of particular significance in arriving at this balance.

The Board notes that in the instant matter, the section 240 complaint was still in process and the hearing had not even been concluded when NABET filed the complaint alleging a violation of section 94 on August 7, 1990; NABET does not seem to have been deterred by its own argument.

The unjust dismissal claim was upheld by the adjudicator in a decision dated October 5, 1990. The adjudicator ordered Dartmouth Cable TV to pay Mr. Barkhouse five months's wages but decided that he should not be reinstated. Presumably if he had been reinstated, this complaint would not have been pursued before the Board by NABET.

#### IV

Counsel for Dartmouth Cable TV argued that the complainant knew of "the action or circumstances giving rise to the complaint" as soon as Mr. Barkhouse was dismissed on January 4, 1990. The complaint should have been filed within 90 days of that date. "The action or circumstances giving rise to the complaint" were the termination of his employment, not the revelation months later of some further evidence concerning the reason for that termination. If the 90-day clock did not begin to tick until the complainant had a clearer picture of why he had been dismissed, what kind of evidence as to the reason for

the dismissal would the Board expect as a minimum? Would some bare-bones initial evidence be sufficient? Or would it have to be credible evidence or clinching evidence? Counsel argued, among other things, that it is the act, not the evidence, that is and ought to be the key factor in setting off the time clock. The union believed that the person seeking its assistance had been fired for no apparent cause. The union suspected an anti-union motive; this was clearly shown by the paragraphs in the letter Mr. Dobbin helped Mr. Barkhouse to frame which suggested that an unfair labour practice had occurred and which threatened legal action.

NABET's counsel, on the other hand, argued, among other things, that the termination alone was not the "action or circumstances giving rise to the complaint". The circumstances encompassed the whole situation surrounding the dismissal, the "aura of the event", of which the reason for the dismissal was a significant part. The union did not know of the reason - and that there was the distinct probability of an unfair labour practice in violation of section 94 - until such came out in testimony at the June 26 unjust dismissal hearing. Only then did the union have some evidence that justified the filing of a complaint. Counsel felt that it could not possibly be the policy of the Board that a party must run to it and file a complaint on suspicion alone? Unions should only file complaints when they have some evidence, not when they have no evidence.

Union counsel argued, in effect, that Mr. Barkhouse's disability made him unable to "know" until June 26, 1990 that he actually had a complaint of violation of section 94. Not until June was he able to relate the Fogarty conversation about possible union organizing, or indeed

the whole matter of his union involvement, to the dismissal, thus transforming it from an unjust dismissal in violation of section 240 into an unfair labour practice as per section 94.

V

The complaint before the Board in this case appears to have been initiated by Barney Dobbin (via counsel) on behalf of NABET and Mr. Barkhouse. The evidence shows that the complainant (NABET as represented by Mr. Dobbin) knew of Mr. Barkhouse's dismissal as soon as it occurred.

In connection with that dismissal, the complainant also knew of the following:

- Mr. Barkhouse had been involved in an effort to initiate a union organizing campaign;
- the two people he had tried to line up to help him get it started became unavailable at the last minute;
- the employer asked for Mr. Barkhouse's resignation, and threatened to fire him if it was not forthcoming, for no particular reason;
- no reason was given for the termination, which occurred only by way of the presentation of a termination slip, not a letter of any kind.

The complainant suspected the following:

- that the two people lined up to help with the organizing campaign had been "scared or something";

-           that the dismissal had occurred because of Mr.  
Barkhouse's involvement with NABET.

The complainant was unaware that the company knew, when it fired Mr. Barkhouse, that he had been involved with NABET. (This was the piece of information that did not surface until the adjudication hearing on June 26, 1990.)

To be frank, the Board is surprised that the complainant did not file a complaint alleging that the dismissal was a violation of section 94(3) as soon as it took place. The Board's experience is that organizations and individuals are not at all shy about filing complaints on the basis of suspicion where somebody has been dismissed coincidentally with a union organizing campaign. Suspicion, in fact, is often all the complainant has to go on when it comes to a question of employer motive for a dismissal.

It must be remembered that while section 240 (or a collective agreement for that matter) is designed to provide for a review of the merits or demerits of a dismissal, section 94(3) is intended to get at the motive for a dismissal (however much it may be justified by the employee's performance) and to make it illegal for an employer to be motivated by anti-union animus in getting rid of somebody.

In order to come to grips with the motive behind a dismissal, the Code requires in section 98(4), by imposing a burden of proof on the party responsible for the dismissal, that that party explain the rationale for the dismissal and lead the Board to conclude on a balance of probabilities that anti-union animus was not at all a motivating factor in the dismissal. In practice, the

employer is obliged to put in its case first at a hearing and to explain why it dismissed the person.

In the Board's view, this scheme of the legislation implies that mere suspicion is not inappropriate as a triggering mechanism for a complaint. (And, as has been stated, in the Board's experience mere suspicion very often is the sole basis for a party concluding that a dismissal must have been in breach of section 94(3) and that therefore a complaint may prove to be viable.)

As for the word, "circumstances", as opposed to the word "action", in section 97(2), the Board does not consider that it acts in any way as a modifier of the 90-day requirement in a dismissal case of this kind. In the Board's opinion, the word, "circumstances" means much the same thing as "action". It should not have read into it any implication that it goes beyond the action itself and encompasses the facts surrounding the action.

Section 97(1) of the Code provides for many different types of complaints to be made in writing to the Board that employers or trade unions, or persons acting on behalf of either, have "contravened or failed to comply with" sections 24(4), 37, 50, 69, 94 or 95 of the Code and any person has violated section 96. Each of the numerous things in those sections which are proscribed or required, as the case may be, varies in character. A dismissal which is forbidden by section 94(3)(a), for example, tends to occur at a single point in time and constitutes a specific "action" by an employer against an employee; on the other hand, failure to bargain in good faith which is dealt with in section 50, for example, is rarely something which occurs at a single point in time but is normally a series of actions which may be spread over a period of

time and which, taken together, adds up to a violation of section 50. This package occurrence is better characterized as "circumstances" than as "action".

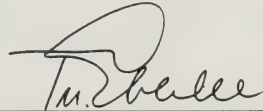
Because of the differences in the matters sought to be dealt with by these various sections, the legislative draftsman has used the words "actions or circumstances" to describe any and all of the events concerning which a party may complain as per section 97(1).

The contravention or failure in each provision has to do with the actual act perpetrated by the other party, contrary to the Code, whether that act is highly time-specific or is in the nature of a package like a failure to bargain in good faith. What the complainant is expected to "know" is not the whole story surrounding the actual act but rather that it has taken place. If a person believes that the actual act may be in violation of the Code, he or she may file a complaint. The Code sets no threshold standard as to the strength of the belief. It simply assumes that knowledge of the act may trigger a complaint but that a complaint must not be made later than 90 days after the act has occurred. Somebody who has been fired but has chosen not to view the firing as a violation of section 94(3) (although he had been involved in a simultaneous union organizing campaign) and has let several months go by until, one day, the former employer meets him and says to him: "Oh, by the way, you were actually fired for union activity", would simply be out of luck in filing a complaint. Unfortunately for Mr. Barkhouse, he is somewhat in the latter category.

The 90-day time limit on the filing of complaints may not always ensure that perfect justice is done to those affected by employer, union or individual violations of

sections 24(4), 37, 50, 69, 94, 95 or 96 of the Code; its purpose, however, is to give some finality to matters which arise in the course of industrial relations, the idea being that on balance it is important in industrial relations to get on with life rather than to leave matters open to the potential for litigation over a prolonged period.

The Board has concluded that the complaint in this particular case should have been filed within 90 days of the termination and not within 90 days of the complainant becoming aware of a significant piece of information that might well have strengthened the complainant's case under section 94 of the Code. The Board cannot entertain the complaint and it is accordingly dismissed.



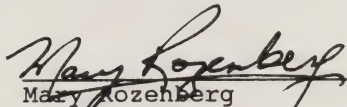
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Thomas M. Eberlee  
Vice-Chairman



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Calvin B. Davis  
Member of the Board



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Mary Rozenberg  
Member of the Board

ISSUED at Ottawa, this 21<sup>st</sup> day of May, 1991.

CLRB/CCRT-874



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## Summary

GARRY LLOYD AGER, COMPLAINANT,  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS  
AND DAVID S. KIPP, RESPONDENTS, AND  
VIA RAIL CANADA INC., EMPLOYER.

Board Files: 745-3816  
745-3822

Decision No.: 875

## Résumé de Décision

GARRY LLOYD AGER, PLAIGNANT, LA  
FRATERNITÉ DES INGÉNIEURS DE  
LOCOMOTIVES ET DAVID S. KIPP,  
INTIMÉS, AINSI QUE VIA RAIL CANADA  
INC., EMPLOYEUR.

Dossiers du Conseil: 745-3816  
745-3822

N° de Décision: 875

These reasons deal with two complaints  
under the duty of fair representation  
provisions in section 37 of the Code  
in which the complainant alleges that  
the Brotherhood of Locomotive  
Engineers and its representative, Mr.  
David S. Kipp, dealt with two of his  
grievances in an arbitrary,  
discriminatory or bad faith manner.

The complaints were dismissed as being  
totally without merit.

Les présents motifs portent sur deux  
plaintes de manquement au devoir de  
représentation juste en violation de  
l'article 37 du Code. Le plaignant  
allègue que la Fraternité des  
ingénieurs de locomotives et son  
représentant, David S. Kipp, ont  
traité deux de ses griefs d'une  
manière arbitraire ou discriminatoire  
ou de mauvaise foi.

Le Conseil a rejeté les plaintes parce  
qu'elles n'étaient aucunement fondées.



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Travail

Reasons for decision

Garry Lloyd Ager,

*complainant,*

Brotherhood of Locomotive  
Engineers and David S. Kipp,

*respondents,*

and

VIA Rail Canada Inc.,

*employer.*

Board Files: 745-3816  
745-3822

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The Board was composed of Vice-Chair Hugh R. Jamieson,  
and Members Calvin B. Davis and Michael Eayrs.

The reasons for this decision were written by Vice-Chair  
Hugh R. Jamieson.

Appearances:

Garry Lloyd Ager, for himself;

James L. Shields, for the respondents;

No one appeared for VIA Rail Canada Inc.

I

These reasons deal with two complaints under the duty  
of fair representation provisions contained in section  
37 of the Canada Labour Code which were filed by Mr.  
Garry Lloyd Ager (the complainant) in December 1990.  
Both complaints name the Brotherhood of Locomotive  
Engineers (the BLE or the union) and the union's General  
Chairman, David S. Kipp, as respondents and specify that  
the conduct which is alleged to constitute a breach of  
the Code was a decision not to proceed to arbitration  
with two grievances which had been filed by the  
complainant.

In the first complaint which was filed on December 18, 1990 (Board file 745-3816) the complainant alleges that he was improperly removed from his position as a trainman with VIA Rail Canada Inc. (the employer) at Vancouver and was transferred to Prince Rupert, B.C. to work as a locomotive engineer. The complainant goes on in the second complaint, which was filed on December 21, 1990, to claim that while he was working at Prince Rupert the employer failed to provide him with the number of hours guaranteed by the collective agreement. Both the alleged improper transfer and the purported failure to meet the guarantee were grieved by the complainant and the BLE processed both matters through the preliminary steps of the grievance-arbitration process on his behalf. However, the union decided that neither grievance had sufficient merit to warrant proceeding to arbitration and, after having made numerous unsuccessful attempts to achieve a settlement of the grievances, the union dropped them both. It is this decision not to proceed with the grievances that the complainant says is a violation of the union's duty of fair representation. The complainant also attacks the way in which Mr. Kipp dealt with the grievances.

The respondents denied that they had violated section 37 of the Code and a hearing was conducted into these complaints at Vancouver on May 7 and 8, 1991.

## II

At the hearing the Board heard a lot about the complainant's views of where the union had been wrong

in its interpretation of the collective agreements that the complainant said were relevant. These included the BLE agreement, the "Special Agreements" between CN Rail and CP Rail and various trade unions going to the transfers of "Off Train" and "On Train" employees from both CN Rail and CP Rail to Via Rail when Via Rail was established in 1978 or thereabouts and, the United Transportation Union (UTU) collective agreement under which the complainant was working at the time of his transfer to Prince Rupert. We also heard much about the complainant's opinions on how the provisions of the BLE collective agreement going to the minimum guarantee of hours should be interpreted and applied. The complainant was obviously convinced that had the union listened to him and done as he had advised them the grievances would have been won at arbitration and that he, the complainant, would have been awarded a substantial amount of monetary compensation.

Unfortunately for the complainant, the BLE did not agree with his interpretation of its collective agreement which, according to the union, is the only agreement that is or was applicable to the circumstances complained about.

In regards to the transfer, the complainant had alleged that the employer had not complied with the posting requirements of the collective agreement prior to his transfer. The agreement requires a notice be posted for 14 days and in this instance the employer posted only for 7 days. In addition to the length of time of the posting, the complainant also suggested that the notice was not circulated as widely as it should have been. The BLE did not disagree that the employer had

technically failed to follow the proper posting procedure but the union also pointed out to the complainant that even if the posting had been done in strict accordance with the collective agreement there was only one other BLE member who could have applied for the Prince Rupert posting and this person was hardly likely to have left his home base voluntarily to transfer to the unpopular Prince Rupert location. According to the union's analysis of the situation the complainant would have been transferred to Prince Rupert in any event only it would have happened 7 days later. The union was therefore prepared to settle this grievance if the employer paid the complainant whatever losses he had incurred during this seven-day period.

When the complainant got wind of this possible settlement, he went out of his way to scuttle the process by refusing to provide certain information to the union which it required to finalize the settlement with the employer.

As for the grievance pertaining to the alleged non-compliance with the guarantee under the collective agreement, the BLE could not accept the complainant's version of how these provisions should be applied. These provisions are rather complicated but the bottom line of the complainant's position seemed to be that he wanted to be paid under the guarantee for hours he was on rest at home base while someone else was operating the train. The union was of the view that it could not successfully argue this point at arbitration. In fact, the union basically agreed with the position taken by the employer in its reply to the grievance. During the hearing there were many exchanges between the

complainant and the union on these differing views and it was obvious to us that the complainant was totally inflexible and that the only interpretation that suited him was his own. No matter what was asked of him, he just kept on repeating his own concepts of the way things were supposed to happen.

All of this points to only one conclusion which is an ongoing dispute between this complainant and the union over the proper interpretation of a collective agreement. The Board has said often that such disputes are not a proper foundation for a complaint under section 37 of the Code which provides:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

Keeping in mind that a bargaining agent has the authority to decide whether to proceed to arbitration with a grievance, a violation of section 37 can only be found if the BLE's conduct, or Mr. Kipp's for that matter, can be found to have been arbitrary, discriminatory or in bad faith. The Supreme Court of Canada has set out what these terms mean in Canadian Merchant Service Guild et al. v. Gagnon et al. (1984), 84 CLLC 14,043:

*"1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit."*

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

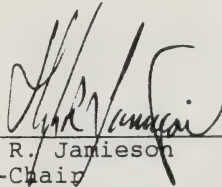
(page 12,188)

In the circumstances here, we are satisfied that the respondents' conduct falls well within the discretion which the union and its representatives are entitled to as exclusive bargaining agent for the locomotive engineers employed by the employer. The decision taken by Mr. Kipp on the union's behalf to drop the complainant's grievances was a decision the union was entitled to make. There was nothing in any of the evidence presented by the complainant which could upset the union's contention that the decision was made in good faith after Mr. Kipp had considered the matters objectively and honestly. Furthermore, the union's handling of the grievances as evidenced by the documentation that was placed before us, mainly by the complainant himself, was far from being incompetent or grossly negligent as the complainant kept suggesting.

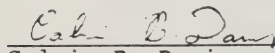
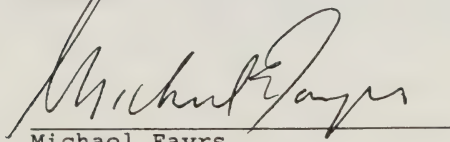
Insofar as the hostility which the complainant referred to, particularly in his complaint about his transfer to

Prince Rupert where he alleged that the union's decision to drop this grievance was for the purpose of teaching him a lesson for filing unfair labour practice complaints against the BLE, we can only confirm that the complainant has indeed over the past several years been very active before the Board and the Federal Court of Appeal. He has instigated many costly actions against the BLE and the UTU as well as the employer and CN Rail, none of which have ever been successful. However, we must say immediately that at the end of the hearing where the Board gave the complainant every opportunity possible to put everything he had before us, there was not one shred of evidence from which we could even draw an inference that the union or Mr. Kipp had any hostility towards the complainant which would have had any influence upon the way the grievances were handled or disposed of.

Taking all of the foregoing into account, we find that the complaints are totally without merit and they are dismissed accordingly.



Hugh R. Jamieson  
Vice-Chair

  
Calvin B. Davis  
Member  
Michael Eayrs  
Member

DATED at Ottawa this 10th day of June, 1991.



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## Summary

## Résumé de Décision

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, APPLICANT, AND WESTERN MANITOBA BROADCASTERS LIMITED, RESPONDENT.

L'ASSOCIATION NATIONALE DES EMPLOYÉS ET TECHNICIENS EN RADIODIFFUSION, REQUÉRANTE, ET WESTERN MANITOBA BROADCASTERS LIMITED, INTIMÉ.

Board Files: 530-1806  
530-1843  
555-3048

Dossiers du Conseil: 530-1806  
530-1843  
555-3048

Decision No.: 876

N° de Décision: 876

Application for certification (section 24 of the Canada Labour Code - Part I) filed by the National Association of Broadcast Employers and Technicians (NABET) to represent employees of CHMI/MTN Television, a division of Western Manitoba Broadcasters Limited.

L'Association nationale des employés et techniciens en radiodiffusion (NABET) a présenté une demande d'accréditation en vertu de l'article 24 du Code canadien du travail (Partie I - Relations du travail) en vue de représenter les employés de CHMI/MTN Television, une division de Western Manitoba Broadcasters Limited.

Application pursuant to section 18 of the Code seeking to have the Board review its certification at CKX Television, CKX-AM and CKX-FM radio. Nabet seeks to eliminate a number of exclusions that were present in the certificate.

En outre, NABET a présenté une demande en vertu de l'article 18 du Code afin de faire réviser l'accréditation qu'elle détenait à l'égard de CKX Television et des stations radio CKX-AM et CKX-FM. Elle tente ainsi de supprimer certaines exclusions qui figuraient dans le certificat d'accréditation.

Application pursuant to section 18 of the Code seeking an order for a single certificate for CHMI/MTN Television and the CKX operations.

NABET a présenté une deuxième demande en vertu de l'article 18 du Code en vue d'obtenir un seul certificat à l'égard de CHMI/MTN Television et de l'entreprise CKX.

It is not the Board's practice to hold hearings into applications for certification and applications dealing with employee status or appropriateness of a bargaining unit. However, in this case, the Board decided a hearing was necessary in order to deal with the whole picture.

Le Conseil n'a pas l'habitude de tenir des audiences dans le cas de demandes d'accréditation et de demandes concernant le statut d'employé ou le caractère approprié d'une unité de négociation. Cependant, le Conseil a décidé en l'espèce qu'il y avait lieu de tenir une audience pour avoir une vue d'ensemble.

The Board found that two separate bargaining units were appropriate for collective bargaining. It granted the application for certification affecting CHMI/MTN Television and found that some classifications formerly excluded were appropriate for inclusion in the bargaining unit covering employees of the CKX operations.

Le Conseil a jugé que deux unités de négociation distinctes étaient habiles à négocier collectivement. Il a agréé la demande d'accréditation visant CHMI/MTN Television et a jugé que certaines classifications exclues devaient être incluses dans l'unité de négociation comprenant les employés de l'entreprise CKX.

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Reasons for decision

National Association of  
Broadcast Employees and  
Technicians,

*applicant,*

*and*

Western Manitoba Broadcasters  
Limited,

*respondent*

Board Files: 530-1806  
530-1843  
555-3048

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The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Mr. J.-Jacques Alary and Mrs. Evelyn Bourassa, Members.

Appearances:

Mr. Daniel J. Rogers, for the applicant; and

Mr. E.W. Olson, for the respondent.

These reasons for decision were written by Mrs. Evelyn Bourassa, Member.

I

These reasons deal with the following three applications filed by the National Association of Broadcast Employees and Technicians (NABET).

- On December 12, 1989, NABET applied to the Board under section 24 of the Canada Labour Code for certification as bargaining agent to represent employees of CHMI/MTN Television which is located at Portage la Prairie and Winnipeg (Board file no. 555-3048).
- On January 25, 1990, an application pursuant to section 18 of the Code for review and reconsideration of a certificate was filed by NABET. This certificate

related to an application filed by the union on August 28, 1989 to represent employees at CKX-TV, CKX-AM and CKX-FM radio located in Brandon, Manitoba (Board file no. 530-1806).

More specifically, NABET requested that the certificate issued by the Board on December 20, 1989 be amended to eliminate a number of exclusions contained in the certificate (Board file no. 555-2990).

- Finally, on May 18, 1990, the Board received from NABET another application under section 18 of the Code seeking an order for a single certificate for both the CHMI/MTN operation of Western Manitoba Broadcasters Limited (Western) in Portage la Prairie and Winnipeg and the CKX operations in Brandon (Board file no. 530-1843).

At the time NABET filed this application, the Board had not yet rendered a decision with regard to the applications in files 555-3048 and 530-1806. The union made it clear that it was an alternative application to both the section 18 application in relation to CKX and the certification application pending before the Board at that time:

*"...This application is for a joint bargaining unit and therefore a joint certification, in relation to both the CKX operations and the CHMI/MTN operations. This application is an alternative application in that if it is not granted, we will still be pursuing the earlier application for reconsideration at CKX and the separate application for certification at CHMI/MTN."*

It is well known that the Board is empowered to and most often does determine the appropriate bargaining units relying on written submissions from the parties and such information it deems necessary, without holding a hearing:

"The Canada Labour Relations Board has adopted a practice aimed at reducing if not eliminating the necessity to conduct hearings in certification and other such applications dealing with 'employee' status or 'appropriateness' of bargaining units where the issues are mostly a question of fact rather than credibility. The decision not to hold hearings was upheld in the Federal Court of Appeal (see Durham Transport Inc. v. International Brotherhood of Teamsters et al. (1978), 21 N.R. 20; Greyhound Lines of Canada Ltd. and Office and Professional Employees International Union, Local 458 (1979), 24 N.R. 382; C.S.P. Foods Ltd. v. Canada Labour Relations Board et al. (1979), 25 N.R. 91 and [1979] 2 F.C. 23; and Canadian Arsenal Limited v. Canada Labour Relations Board et al., [1979] 2 F.C. 393). The necessary factual information in those types of applications can be readily obtained by way of investigation by the Board's officers as well as by written submissions of the parties. All submissions filed are exchanged and the report of the Board's officer, excluding any reference to employee wishes, is provided to the parties for comment if they so desire. ..."

(CFTO-TV Limited (1981), 45 di 306 (CLRB no. 345), p. 310)

In the initial application for certification at Brandon, the parties were informed of the Board's policy to determine the appropriate bargaining unit without having to hold a hearing. The Board dealt with the application based on the parties' submissions.

Moreover, NABET did not request a hearing, and few controversies stemmed from the parties' written submissions. Because of the extreme differences between the parties' views concerning the duties and functions with respect to the CHMI application and because the application for reconsideration filed by the union raised sufficient doubt in the minds of this panel to warrant a hearing, it concluded that in the circumstances, it was necessary to deal with the whole picture and hence, it decided to hold a hearing with respect to the three applications. The hearing enabled the parties to present to the Board evidence and arguments concerning the union's application for a single certificate for both operations

and to determine the positions to be excluded because the incumbents performed management functions or were employed in a confidential capacity. The hearing was held in Winnipeg June 26 to 28, 1990 and July 25 to 28, 1990.

This hearing lasted a total of seven days and written argument went on for another two months.

Subsequent to the hearing and written submissions of the parties, the Board, on October 23, 1990, issued a certificate for a unit of employees of CHMI/MTN Television employed at Winnipeg and Portage la Prairie. It also issued an amended certificate for a unit of employees of the CKX stations in Brandon. These are the reasons for the Board's decision.

## II

Western has several interests in the broadcasting industry. It is licensed to operate two radio stations (CKX-AM and CKX-FM) and a television station (CKX-TV), the latter being a CBC affiliate. All three stations are located in the same building at Brandon, Manitoba.

In addition, Western owns and operates CHMI/MTN Television in Portage la Prairie and Winnipeg.

It also operates another television station (Inter-Mountain TV) in Dauphin, Manitoba. The employees of the Dauphin television station are currently represented by the Manitoba Food and Commercial Workers Union (Board file no. 555-2531).

Moreover, Western owns and operates a number of unrelated business enterprises in and around Brandon. Its corporate

offices are located in Brandon. Western is under the general control of Mr. Stuart Craig, President and Chief Executive Officer, and of members of his family.

### III

The first issue the Board must determine is whether it is appropriate to grant NABET's "alternative" application seeking a single bargaining unit covering employees working at CHMI Television and employees working at the CKX operations in Brandon.

The union submits that there exists a sufficient integration of operations and a sufficient community of interests between the two broadcasting facilities and especially between the two television stations to make it appropriate to issue a single certificate.

It also alleges that the employer's administrative structure is such as to easily accommodate a single bargaining unit. According to the union, the two locations are interrelated, the majority of the administration related to both locations is already centralized as is the decision-making for Western.

The employer is of the view that issuing a single certificate would not reflect the managerial structure of those distinct broadcasting operations and would be inappropriate because they meet different economic considerations and cater to different markets and audiences. It also submits that the timing of the application for a joint certificate is inappropriate. The employer states that the application to join CKX and CHMI was filed as an alternative to the application to review the Brandon certificate. According to the employer, NABET

filed this application as an afterthought and as an attempt to obtain further review of the CKX certificate.

#### IV

The Brandon operations are managed by Stuart Craig assisted by his son, Boyd Craig. The television station was licensed by the CRTC in 1954 to provide CBC programming to Western while CHMI which only went on the air in 1986 is an independent television station with no network affiliation.

The latter was granted a separate license by the CRTC in 1985. Its general manager and assistant manager are Drew and Miles Craig, sons of the President and Chief Executive Officer of Western. The evidence revealed that CKX and CHMI Television operate in two different market areas. Brandon is one of the smallest markets of the country and is aimed primarily at a rural market while CHMI, which is located in the eight largest markets in Canada, Winnipeg, is aimed at a highly competitive urban market in addition to its focus on rural audiences in and around Portage la Prairie. Stewart Craig testified that CHMI has made a commitment to the CRTC to extend its service to Brandon and Dauphin. It will eventually broadcast in those locations, in competition with CKX. The time frame for this change was not established.

Various witnesses called by the parties stated that CKX-TV relies heavily on its CBC affiliation while a large portion of CHMI's programs must either be produced by its employees or purchased by the station. Because of the fierce competition that is present in the urban market, a high standard of quality must be maintained in production. That is why, according to Drew Craig, the

experience level required is substantially different in each station.

Current and former CHMI employees supported that theory by stating that positions at CHMI were more demanding and required superior qualifications and skills. Former Brandon employees who moved to the Portage la Prairie and Winnipeg locations when CHMI initially started broadcasting also testified on this subject and told the Board that the wage rates were different at each location.

According to the evidence, CHMI television possesses sophisticated technical equipment to produce their programs while the Brandon stations operate with older equipment. Apparently, most employees use CKX at Brandon as a training ground or entry level for larger television stations in Winnipeg or elsewhere.

A production editor from Portage la Prairie who has worked previously at CKX, Mr. Witynck, explained that there were positions at CHMI that did not exist at the Brandon operation because each station worked differently.

Although CKX and CHMI are commonly owned by Western, they are both run independently by their respective managers. All sales and programming decisions at each station are made independently. Each operation has its own sales department which is the life-blood of any privately owned broadcasting business. National sales representatives have also been hired by each operation because of their disparities. At CKX, local sales, represent 80% of the total sales while the remaining 20% constitutes the national sales. The situation is reversed in the case of CHMI, as the national sales represent the bulk of their contracts.

Much was said about the degree of co-operation between the two television stations in terms of production of local programming such as the Midday newscast and programs entitled Prairie Lifestyle and Agriviews which represent approximately 5% of CKX air time. This situation is part of the union's first argument in support of its application for a single certificate.

It was argued that both stations are linked by audio, video and telephone hook-ups which would indicate a close relationship between the operations. This panel does not believe, however, that much turns on this fact.

For example, the evidence revealed that there is also a 24-hour direct link between CKX and CBC. Could a conclusion be drawn from this?

In television broadcasting, it is not unusual for related or unrelated stations to air stories that have been produced by another station. Television stations are often members of organizations that trade news on a regular basis. CKX and CHMI are members of such an organization called Independent Satellite News (ISN) which is made up of a group of stations across Canada and was created for that purpose. CHMI, for example, obtains feeds from other independent television stations such as CITY-TV in Toronto, but it also feeds stories to other stations in the same way. No fees are paid for such feeds.

With respect to CKX and CHMI, there is a news director at each station who makes independent decisions on the stories to cover. If a story gathered by reporters of CKX-TV could fit the focus of the other station, the CHMI

news director may decide to air the story as well, but the stories may also come from various other sources as described above. Al Thorgeirson, News Director at CHMI, indicated that the use of CKX information was less than the use of other independent television stations' information. Rich Allan Adams, one of the Brandon reporters, said that they try to accommodate CHMI whenever possible but that their priority is CKX.

One aspect of the evidence related to the traffic and accounting department. With the exception of one traffic position which is located in Winnipeg, the traffic functions for both operations are performed by Western employees at the Brandon operation. In addition, all accounting personnel and the controller for the corporation are based at the Brandon facilities. On this subject, the evidence established that the Brandon head office also handles all accounting for Inter-Mountain TV in Dauphin whose employees are represented by the Manitoba Food and Commercial Workers Union. In addition, accounting for certain unrelated business owned by Western is performed by the same employees in Brandon.

In summary and without elaborating on the evidence produced by the parties at the hearing, we are far from being convinced that Western's administrative and organizational structure warrants the issuing of a joint certificate, nor are we convinced that there exists a sufficient community of interest for the following reasons.

- CHMI is an independent television station committed to produce, in large part, its own local programs whereas CKX-TV is a CBC affiliate with network commitments.
- The stations are separately licensed by the CRTC.

- CHMI has no associated radio operations while CKX-TV has two radio stations.
- Both operations are physically and geographically separated and evolve in different markets. Brandon is one of the smallest markets in Canada. On the other hand, CHMI has an audience of more than three quarter million viewers and is highly competitive.
- The operations of each broadcast entity are controlled by their respective managers and management personnel.
- The wage rates and experience level required in the two locations are substantially different.

It should be noted that in the broadcast industry, the Board frequently certifies appropriate bargaining units by station. In New Brunswick Broadcasting Co. Limited (1988), 75 di 101 (CLRB no. 711), the Board stated the following:

"Here, we are not dealing with a single plant situation where an employer extends its business by building an annex and hires additional employees. Nor are we dealing with a corporation that has nation-wide bargaining units and where the corporation's business expands by opening a new department or extending its business to a new location. We have before us here, a new television station that operates in the private sector of the broadcasting industry where it has been the practice of this Board to grant bargaining rights through the certification process primarily on a station by station basis. When we speak of the broadcast industry, we do not of course include the CBC where there are nation-wide bargaining units. As we said, we are dealing here with the private sector of the industry where there are privately owned television stations spread throughout most of the major centres in Canada. Some of those television stations are affiliates of CBC, like CHSJ-TV, Saint John, others are tied into the CTV Network. It is in this area of the industry that we refer to the Board's practice of certifying appropriate bargaining units station by station.

Notwithstanding that CHSJ-TV and MITV are commonly owned by the employer and that there is a certain amount of operational integration in programming and administrative support staff, MITV is still a separately licensed, separately located, stand alone independent television station. ..."

(pages 111-112)

Likewise, in the case before us, Western owns both CKX and CHMI, but also operates another television station in Dauphin, Manitoba, for which the Board issued a separate certificate.

It is also true that there exists a certain degree of operational integration in programming and administrative support staff as was stated in these reasons.

However, the evidence reveals that part of the administrative support extended to the CHMI operation by the employees at the Brandon head office is also provided to Inter-Mountain TV. This is normal in view of the fact that the corporate head office is located in Brandon, that all records including those of business unrelated to the broadcasting companies are kept in that office and that the computer hardware is located in Brandon.

All of this prompts the Board to question the appropriateness of issuing the requested single certificate in the circumstances because in reality what we are dealing with here is two separately licensed and separately located private broadcasting operations, one of which is an independent stand alone television station.

V

For all these reasons, the Board finds that the alternate application filed by the union for a single certificate should not be granted. Before leaving this matter entirely, however, it is necessary to comment on some aspects of this application which have caused the Board some concern.

NABET filed an application for certification in respect of employees of CHMI/MTN in Portage la Prairie and Winnipeg on December 12, 1989. In making such an application NABET was in essence stating to the Board that it was the opinion of NABET that the bargaining unit comprised of employees of CHMI/MTN was appropriate for collective bargaining. This inference is drawn from section 24(1) of the Code which states:

*"24(1) A trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining may, subject to this section and any regulations made by the Board under paragraph 15(e), apply to the Board for certification as the bargaining agent for the unit."*

(emphasis added)

On May 18, 1990, before this Board had issued a decision with respect to the certification application filed on December 12, 1990, NABET filed an application for review and reconsideration pursuant to section 18 of the Code in which it sought a single certificate for the CKX operations in Brandon and the CHMI/MTN operation in Portage la Prairie and Winnipeg. Thus NABET was now representing to the Board that this second and larger bargaining unit, which included the unit which was the subject of the December 12, 1990 application, was, in the opinion of NABET, a unit which was appropriate for collective bargaining. No evidence was presented to this Board which would lead it to believe that NABET had become aware, after filing the first application, of any circumstances existing at or prior to the date of filing of the first application which might have caused it to alter its opinion with respect to the appropriateness for collective bargaining of the unit which was the subject of that application. Nor was there any evidence that there had been any significant change in circumstances

arising in the rather brief interval between the filing of the two applications.

Even though the application of May 18, 1990 was characterized by NABET as an "alternative" application NABET's assertion therein that the larger unit is appropriate for collective bargaining appears to contradict its assertion to the same effect in respect of the bargaining unit set out in the application of December 12, 1990. Theoretically NABET may have viewed both proposed bargaining units as being appropriate for collective bargaining. However, in support of the application for a single certificate NABET argued that there existed a sufficient integration of operations and a sufficient community of interests between the CHMI/MTN and the CKX broadcasting operations to make it appropriate to grant a single certificate. If this is so, however, then NABET had, in the application to certify CHMI/MTN, been knowingly advocating a bargaining unit which would have fragmented that community of interest. It is difficult for this Board to understand how a union could view a bargaining unit based on a fragmented community of interest as being appropriate for collective bargaining.

Furthermore the realities of NABET's decision in making the first application, to commit its resources as well as those of the employer and this Board to an application in respect of the smaller unit suggests, in the absence of a change of circumstances or subsequently acquired information and in the absence of any plausible explanation from NABET, that it did not consider the larger unit to be appropriate for collective bargaining.

The apparent contradiction between these two applications becomes even more striking when it is considered that on

January 25, 1990, in the interval between the filing of these applications, NABET had also filed an application to review the certificate issued in respect of the employees of the CKX operations. NABET sought to amend that certificate to include various positions excluded in the initial certification order of December 20, 1989. Thus, as late as January 25, 1990, NABET was also representing to the Board that it considered the bargaining unit of employees of the CKX operations to be in itself a unit which was appropriate for collective bargaining.

For these reasons the filing of the application of May 18, 1990 causes the Board some concern about NABET's motives in this matter. The Board suspects that the employer may be right in alleging that the review application of May 18, 1990 was simply an afterthought on the part of NABET and an attempt to obtain further review of the CKX certificate. The review process is an important tool available to parties and the Board to ensure that certification orders reflect current labour relations realities and conditions and do not become outdated with the passage of time. It should not be utilized by parties in an attempt to gain tactical advantages in the bargaining relationship.

Despite the Board's concerns arising from the review application of May 18, 1990 it has considered it and disposed of it on its merits. It will also consider the application to amend the CKX certificates on its merits despite and not because of the application of May 18, 1990. It does so because there appears to be evidence of circumstances.

In view of the above conclusion, the Board finds it

unnecessary to address the timeliness issue raised by the employer with respect to this application.

VI

**Board file no. 555-3048**

CHMI has been on the air over four years. Although its main facilities are located in Portage la Prairie, it also maintains a news bureau and a sales and business office in Winnipeg.

Approximately 80% of the 65 employees work at Portage la Prairie while the remaining 20% work at the Winnipeg location. CHMI is a young and growing station. When it commenced operations in October 1986, its personnel consisted of approximately 45 persons.

In his submission dated February 7, 1990, counsel for the applicant amended the initial proposed bargaining unit. In his report dated April 11, 1990, the Board's investigating officer stated his understanding of the applicant's proposed bargaining unit, as amended:

*"All employees of CHMI/MTN Television a Division of Western Manitoba Broadcasters Limited, Portage la Prairie, Manitoba and Winnipeg, Manitoba, excluding General Manager, Assistant General Manager, General Sales Manager, Retail Sales Manager, Operations Manager, News Director, Senior Producer-News, Executive Secretary, Creative Director, Promotions Manager and Salespersons."*

The employer objected to the proposed bargaining unit on the grounds that the proposed bargaining unit was not appropriate for collective bargaining. It alleged that the very limited number of proposed exclusions "does not properly recognize the managerial, supervisory, labour relations and confidentiality components of the business

of the Employer."

## VII

Since its inception in 1973, the Board has dealt with numerous cases in the radio and television broadcasting industry. It found that it is virtually impossible to draw any general conclusions which could have broad application. Each case is different and its outcome depends greatly on the size or the nature of the broadcasting operation.

The practices and usages of the individual company must be closely analyzed to determine whether the functions and duties performed in each case are managerial or confidential. Titles alone cannot be relied upon to justify exclusions for they can be deceiving. While some reliance can be placed on previous Board certifications, the actual determination of the functions and duties of the employees must be based on actual facts.

It is common knowledge that in this industry, persons classified as sports director or production manager have been found in some cases to be appropriate for inclusion in a bargaining unit whereas they have been excluded in others.

The decision to include persons in or exclude them from a bargaining unit depends entirely on the facts that come to light from the in-depth investigation conducted by the Board in each application for certification.

## VIII

Employee is defined under section 3 of the Code as

follows:

*"'Employee' means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations."*

The Board in several previous cases established the criteria to determine whether an employee participates in management. On this subject, see Greyhound Lines of Canada Ltd. (1974), 4 di 22; and 74 CLLC 16,112 (CLRB no. 9); Vancouver Wharves Ltd. (1974), 5 di 30; [1975] 1 Can LRBR 162; and 74 CLLC 16,118 (CLRB no. 19); British Columbia Telephone Company (1979), 38 di 145 (CLRB no. 221); Cominco Ltd. (1980), 40 di 75; [1980] 3 Can LRBR 105; and 80 CLLC 16,045 (CLRB no. 240); and Island Telephone Company Limited (1990), as yet unreported CLRB decision no. 811.

In 1974, the Board outlined the criteria to determine the quality or extent of management functions. These standards established in Vancouver Wharves Ltd., *supra*, still apply today:

*"It seems to the Board that the two functions most vital to the employee's status and career are dismissal and promotion or demotion. That is, the authority to make the original decision or the final one if they result from recommendations.*

*The performance of these functions is also that which is most likely to create conflicts of loyalties with membership in the bargaining unit.*

*In order of lesser importance would then come the functions of disciplining employees and of hiring, that is interviewing, assessing and selecting new employees. Again here we are referring to the original or final decision taking process if there are recommending procedures. The exercise of independent judgment in discharging functions which require skill or professional expertise is foreign to our consideration of management functions.*

*Planning and decision-making in the area of job priorities, assignment (not division or allocation) of work to persons, the independent buying or*

requisitioning of material or tools are also of interest to the Board as a criterion.

...

Policy-making or participation in it would also be a significant criterion for this Board.

Participation in or influence over negotiations for a collective agreement is another criterion.

Delegation of the representing function for the company on various committees established jointly with the union, such as safety or grievance procedures, is also of importance.

Responsibilities for establishing budgets and administering them is another."

(pages 55-56; 169-170; and 968-969)

The reasons why a person performing management functions is denied the bargaining rights granted by the Code is based on the existence of conflict of interest. The Board expressed itself in the following manner in Bank of Nova Scotia (Port Dover Branch) (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91):

"The basis of the exclusion of certain 'management' persons from the coverage of collective bargaining is the avoidance of conflicts of interest for those persons between loyalties with the employer and the union. This avoidance of conflicts protects both the interests of the employer and the union. The conflict is pronounced when one person has authority over the employment conditions of fellow employees. It is most pronounced when the authority extends to the continuance of the employment relationship and related matters (e.g. the authority to dismiss or discipline fellow employees). It is for this reason that certain persons are denied collective bargaining rights granted to other employees. The Code is clear that the mere supervision of fellow employees does not satisfy the rationale for exclusion from employee status under Part V (see section 125(4))." [now Part I, section 3(1)]. ..."

(pages 457-458; 134; and 536)

However, this conflict must be real because the effect of exclusion is to deny rights to collective bargaining under the Code. This is why the Board is careful in its assessment of the facts to ensure that the alleged management duties are a primary and on-going function of

the incumbent and that it is not merely a question of an employer sprinkling apparent management authority to gain additional exclusions under the Code.

## IX

Voluminous written submissions and evidence were submitted by the parties. Written submissions were subsequently provided by each counsel. They were all carefully considered by the Board.

As previously stated, the employer alleges that several classifications are inappropriate for inclusion in the proposed unit or the incumbents are not employees within the meaning of the Code. An extensive description of each of the disputed positions would serve no purpose. We will attempt to deal only briefly with the functions and duties of those in dispute. The following classifications relate to positions sought for exclusion on the basis of managerial functions.

### **Senior Producer/Programming**

This classification involves two persons. One producer, John Delaney, produces and hosts a rock program. As producer, he has full control over the selection of videos and the editorial content of the program. Mr. Delaney is not involved in establishing the program's budget. He stated that he has no authority to hire or fire. For example, he has interviewed people for a part-time replacement in the past. He informed the successful candidate that she was hired but only after his choice had been discussed with and approved by the general manager. Furthermore, Mr. Delaney did not participate in establishing the rate of pay although he communicated this information to the successful applicant in writing.

The other producer, Ms. J. Craig, is the general manager's spouse. She is responsible for producing a program entitled F.I.T. She hires the performers who appear on her program. She also selects the type of music that will be used on her show. She is responsible for research as well as the set design for the program. Ms. Craig develops the budget of her program and subsequently submits it for approval. She participated in hiring an executive secretary: she selected the person and then went to the general manager and recommended that she be hired.

There is no evidence that the two incumbents are responsible for hiring staff. It must be said that they were involved in hiring personnel. However, according to the evidence, the ultimate authority to hire in these instances rests with the general manager. The power to recommend is not equivalent to the power to decide in that it cannot be described as "finally determinative." Hence, the ability to effectively recommend is not a criterion retained by the Board to determine management functions. (See British Columbia Telephone Company (1976), 20 di 239; [1976] 1 Can LRBR 273; and 76 CLLC 16,015 (CLRB no. 58); and Radio Saguenay Limitée (1981), 43 di 228 (CLRB no. 310).)

Furthermore, there is no evidence that they have the power to promote or demote members of their production teams nor do they have the authority to discipline them. Finally, their participation in establishing budgets is either non-existent or limited to recommendations requiring approval.

The Board is convinced that the persons performing the functions of producer at CHMI do not perform managerial

duties to the extent that they must be excluded from the bargaining unit.

This finding is in keeping with previous decisions of the Board in which it determined producers to be employees, more specifically in CHLT Télé-7 Limitée (1976), 13 di 49; [1976] 2 Can LRBR 76; and 76 CLLC 16,025 (CLRB no. 61); and Radio Saguenay Limitée, supra.

However, because of Ms. Craig's family ties, the Board is of the view that her inclusion in a bargaining unit consisting of station employees would be most inappropriate. Therefore, it agrees with the union that she should be excluded on that basis.

#### **Production Manager**

This person is responsible for producing programs done outside the station. He occasionally hires freelancers for a set fee in accordance with a budget established by the general manager to whom he reports. He spends approximately 15 to 20% of his time editing and doing camera work.

One month prior to this hearing, the production manager for the first time participated with the general manager in hiring a production assistant. According to the evidence, the hiring was done with the full involvement and input of the station manager who made the final decision.

The incumbent has no decision-making ability in terms of budgets although there are some information-gathering responsibilities for budget purposes. Furthermore, the production manager does not have the authority to purchase equipment without the approval of the station manager.

The Board finds the responsibilities and functions of the production manager in this instance to be similar to those associated with the professional duties of the producers.

The employer argued that the incumbent's authority and responsibilities will increase greatly when the station is in full swing in the area of outside production, and that the position should therefore be excluded. According to the employer, this person will be involved in decisions of a labour relations nature and will have access to the employer's labour relations and other business strategies.

The Board does not agree with that statement. In its opinion, it must look into the actual situation, that is, the facts as they are known to the Board at the time of the hearing. The Board had the opportunity to look into a similar situation in Coopérative de Télévision de l'Outaouais (1975), 10 di 27; [1975] 2 Can LRBR 278; and 75 CLLC 16,178 (CLRB no. 49), where it said the following:

*"... In this regard, the Board must reject the employer's contention that one must consider not only the role that such persons play at the present time, but also the authority they may be expected to wield, should the undertaking develop normally. The Board cannot base its decisions on hypothetical considerations. It can only take into consideration the actual situation as shown in the evidence adduced. If the situation later changes, the employer may file an application under section 119 [now section 18] of the Code in order to have the certification order amended accordingly."*

(pages 28; 280; and 1289)

In the present circumstances, the Board has reached the conclusion that the production manager is an employee within the meaning of the Code and should be included in the bargaining unit. If the circumstances change significantly as the employer suggests, the matter can

then be brought back before the Board for further consideration.

According to the employer, the following classifications are managerial positions. We will briefly outline the duties of those disputed positions.

#### **Sports Director**

The evidence revealed that the incumbent essentially fulfils a sports-reporting function on weekdays. The sport reporter whose position is included in the unit performs identical functions during the week-end. The time sheets of the sports director are signed by the news director to whom he reports.

#### **Building Supervisor**

This position was filled one month prior to the hearing. The Board received no detailed information on this position. It understands that the incumbent is responsible for the general maintenance of the station's facilities.

#### **Program Co-ordinator**

This position ensures that various programs received at the station either by satellite feed or by tape arrive on time at the station. Co-ordinating satellite feeds as well as receiving and shipping tapes are part of the incumbent's duties. To this end, she deals with various satellite companies and distributors. She also ensures that all proper documentation required by the CRTC is completed. The Board understands that this documentation pertains to the daily program logs which must indicate the exact start and end time of each program, commercials and identification that is aired in accordance with CRTC requirements.

She reports to the general manager who develops and establishes the station programming. In his absence, she decides what replacement program to air in the event that a program is cancelled.

**Traffic Co-ordinator**

This person does the logging and scheduling of promotions as well as scheduling make-goods for commercials that have not been aired in accordance with the sales contracts. When this occurs, the incumbent checks the ad's priority number and based on this number, she reschedules the commercial spot in keeping with the guidelines she must follow.

**Assistant Operations Manager**

This person testified that his role was one of switcher director on the 4:00 p.m. to midnight shift. He told the Board that the day-to-day managerial functions are handled by the operations manager. The incumbent of this position cannot hire or fire nor can he influence the fiscal policies of the employer.

**Photo Supervisor**

According to the evidence, photo supervisors perform essentially the functions and duties of senior photographer. The duties performed by the photo supervisors can be identified at best as lead hands.

Taking all the facts into account, the employer has failed to satisfy us that the persons in the above-mentioned positions perform management functions of the nature and to the extent that would require their exclusions of the bargaining unit. To the contrary, the evidence convinced the Board that these people are employees who carry out

duties and functions which the Board has found, as a general rule in this industry, to be appropriate for inclusion in an all-encompassing bargaining unit.

**Program Director**

**Independent Production and Programming Manager**

Based on the information before the Board, it determines that these two positions constitute management positions.

However, it hesitates to make the same finding in the case of the positions of **Bureau Manager, Chief Engineer and Senior News Editor.**

After careful study of the lengthy submissions and evidence produced, the Board concluded that these three positions should not be included in the said bargaining unit because their incumbents perform management duties.

The Board is well aware that these three cases are borderline. Although it accepts the employer's evidence in the instant case, the Board is of the opinion that the company would benefit from clarifying and reinforcing the power and authority of these positions in order that no doubt subsists in the mind of the union as to whether or not they should be part of the unit.

The employer objects to the inclusion of the following classification in view of the confidential nature of the work involved.

**Executive Secretary**

One position is filled by Heidi Engelberg who acts as secretary in the sales department in Winnipeg. Part of her work involved script filing and news clipping for the news department as well as answering incoming calls.

The employer maintains that the executive secretary in the sales department has access to extremely confidential information such as client files, marketing and other business strategies of the employer's local and national clients as well as accounts receivable.

Confidential capacity relating to industrial relations has been explained by this Board in Bank of Nova Scotia, supra. It outlines the three-fold test retained by this Board to determine confidentiality in these matters.

"The denial of collective bargaining rights to persons employed in a confidential capacity in matters relating to industrial relations is also based on a conflict of interests rationale. The inclusion of that person in a unit represented by a union might give the union access to matters the employer wishes to hold close in its dealings with the union. These include bargaining, grievance and arbitration strategy. To avoid that conflict and to assure the employer the undivided confidence of certain employees these persons are denied the right to be represented by a union even if they wish to be represented. However, this exclusion is narrowly interpreted to avoid circumstances where the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of persons enjoy the freedoms and rights conferred by Part V [now part I].

To this end this Board and other Boards have developed a three-fold test for the confidential exclusion. The confidential matters must be in relation to industrial relations, not general industrial secrets such as product formulae (e.g. Calona Wines Ltd., [1974] 1 Can LRBR 471, headnote only (BCLRB decision 90/74)). This does not include matters the union or its members know, such as salaries, performance assessments discussed with them or which they must sign or initial (e.g. Exhibit E-21). It does not include personal history of family information that is available from other sources or persons. The second test is that the disclosure of that information as a regular part of his duties. It is not sufficient that he occasionally comes in contact with it or that through employer laxity he can gain access to it. (See Greyhound Lines of Canada Ltd. (1974), 4 di 22, and Hayes Truck Ltd., [1974] 1 Can LRBR 284)."

(pages 460; 136; and 537)

The Board finds that the incumbent of the executive secretary position in Winnipeg does not meet the test set

out in Bank of Nova Scotia, supra. While the Board usually excludes salespersons in the broadcasting industry in view of the special nature of their work and working conditions, this is not the case of secretarial or clerical staff. Let us point out that section 3(1) of the Code neither requires nor warrants the exclusion of persons having access to confidential information of the nature described by the employer, but calls for the exclusion of only those persons performing confidential duties relating to industrial relations. The Board feels it necessary to reiterate that an employee who wishes to be represented by a union or is included in a bargaining unit does not relinquish his/her moral standards or commitments to the employer. We find that the duties performed by Ms. Engelberg in the sales and news departments are an integral part of the station's normal activities and that she is an employee within the meaning of the Code. Thus, she should be included in the bargaining unit.

There is a newly created executive secretary position who acts as the secretary to the general manager in Portage la Prairie. She was the only secretary employed at that location at the time of the hearing. The Board's practice is to allow the exclusion of at least one person who is expected to act as confidential secretary in industrial relations matters. This position should therefore be excluded.

One additional comment that we must make is related to a classification of persons employed by the company from time to time. The employer does have contractual arrangements with freelancers, however, the union has not sought to represent these people. Therefore, they are being excluded solely on that basis. The Board makes no

finding vis-à-vis their status of employee within the meaning of the Code.

Finally, with respect to casual employees, their services are generally retained by employers to replace regular employees on sick leave, annual leave or unexpected emergencies. The said casuals are those who irregularly or occasionally come on request under the above-mentioned circumstances without knowing when they will be offered another period of employment. The Board shall follow in the instant case its general policy to exclude such employees in the context of an original certification.

X

**Board file no. 530-1806**

As stated above, in its application dated January 25, 1990, the union sought the reconsideration of some of the exclusions the Board ruled upon when it certified Brandon's television and AM-FM radio operations on December 20, 1989.

At the time of the initial application for certification, an investigating officer of the Board was appointed to look into the application and to report to the Board. Each party was given every opportunity to file its submissions with respect to the positions in dispute. The employer and the union were in fact invited to file detailed submissions on the basis that the Board's decision is most often rendered without a hearing. At the time the officer filed his report on October 25, 1989 there were 20 such disputed positions. It is interesting to note that while the employer had stated it wished a hearing in these matters, the union was not requesting one. Moreover, the submissions filed by the employer

raised little controversy on the part of the union.

Following the completion of the officer's investigation, the Board addressed the issues at an in-camera meeting. Based on a thorough study of all documents and submissions filed by the parties, the following order was issued:

"all employees of CKX Television, CKX Radio AM, and CKX Radio FM, divisions of Western Manitoba Broadcasters Limited, Brandon, Manitoba, excluding: general manager/president, assistant general manager/vice-president, sales managers, sales persons, TV production manager, chief engineer, traffic manager, controller, executive secretaries, TV operations manager, TV program director, TV supervising producer, assistant controller (payroll officer), accounting supervisor (office manager), radio FM program director, radio AM program director, news director, sports director, farm director, TV creative manager, radio AM and FM creative manager, promotion manager, building supervisor, accounting and traffic personnel, freelancers, casual employees."

The union in the instant case must convince the Board that its application is justified and that there exist serious grounds to compel the Board to alter its original finding, as the Board said in Canadian National Railways (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41):

"The Code and the C.L.R.B. Regulations permit the filing of such an application for review asking the Board to reconsider an order or decision issued by it. Nevertheless, since section 122(1) [now section 22(1)] of the Canada Labour Code provides that orders or decisions of the Board are final, it must be up to the party filing such an application to establish to the satisfaction that its application is justified and that there exist serious grounds which warrant the setting aside of the original order and, in appropriate circumstances, the undertaking of a new investigation and the issuance of a new order or decision. The onus is thus on the applicant to satisfy the Board that the reviewing of the original order or decision is called for. The basis for such an application for review cannot be solely that a party disagrees or is otherwise dissatisfied with an order or decision of the Board. ..."

(pages 26; 336; and 1185)

In its application received on January 25, 1990 the union

is asking the Board to reconsider the following exclusions: TV production manager, executive secretary, TV supervising producer, TV program manager, assistant controller/payroll officer, accounting supervisor/office manager, sports director, farm director, promotions manager, building supervisor, accounting and traffic personnel, freelancers and casuals.

We see no useful purpose in relating in detail the extensive evidence adduced and all written arguments submitted to the Board. The careful review of the testimonial evidence of a total of 23 witnesses and the analysis and study of the innumerable documents, submissions and arguments filed by the parties did not establish to the Board's satisfaction of the Board that amendments to its original order were warranted with the exception of the following excluded classifications which were found to cause real concerns: sports director, farm director, building supervisor, accounting and traffic personnel.

#### **Sports Director**

The incumbent of that position was called to testify with respect to his functions and duties. The evidence revealed that, contrary to the employer's allegations, the sports director does not have the same authority and responsibilities as the news director. While he supervises and gives them assignments the sports reporters, he has no authority to hire or dismiss the employees under his supervision although he has the ability to make recommendations. He explained his involvement in the hiring of regular or part-time sports reporters. The process followed is the same in all cases: his responsibilities are to screen the applications he receives and to submit his recommendation to the assistant

manager who approves or rejects it. When the sports director obtains that approval, he then informs the successful candidate of the decision as well as the rate of pay set by the assistant general manager. In the case of dismissals, it is the assistant general manager who decides. His role is more or less one of lip service. He informs the employee of a decision made by someone else. Finally, the sports director has no input in the preparation of budgets.

The Board in Greyhound Lines of Canada, supra, looked into what is the dividing line between managerial and supervisory functions. One of the criteria it established is that a person acting merely as a conduit between management and employees is considered to be an employee within the meaning of the Code. We conclude this to be the case with regard to the sports director. He has no meaningful participation in the real decision-making concerning company policies nor does he exercise any independent discretionary judgement pertaining to staff relations issues. He merely transmits to employees the decisions made by the managerial team.

In view of the evidence adduced, this panel could not find that there existed any potential conflict of interest in this situation, as described in Bank of Nova Scotia, supra. In our view, the sports director is at best a supervisor. Consequently we find him to be an employee under the Code and to be appropriate for inclusion in the bargaining unit.

#### **Farm Director**

The Board finds the conclusion reached in the case of the sports director to apply equally to the farm director since the employer in his own evidence confirmed that the

farm director is equivalent to the sports director position.

**Assistant Controller/Payroll Officer**

The incumbent of this position did not testify. The evidence submitted at the hearing with respect to this position was vague and very limited. The duties of the incumbent were not detailed but were described by the assistant general manager, in cross-examination in chief, as clerical work. In the circumstances, the Board finds that her inclusion in the bargaining unit is appropriate.

**Building Supervisor**

**Accounting and Traffic Personnel**

These classifications were excluded initially by the Board because of the large portion of time the incumbents spend on work unrelated to the CKX broadcasting operations.

More specifically, the building supervisor was working at or for CHMI building sets and ensuring that the buildings and premises were well maintained. The Board at the hearing was informed that a building supervisor had since been hired by CHMI. This position was included in the CHMI bargaining unit by the Board. Based on the evidence, the Board is satisfied that the building supervisor working at the Brandon location is an employee under the Code who shares a community of interest with the other members of the proposed bargaining unit. Consequently, it includes him in the said unit.

The accounting and traffic personnel was originally excluded on the basis of their involvement in the Portage la Prairie operations. However, since the Board issued its order in December 1989, NABET filed its application for certification to represent employees at CHMI and a

certificate was subsequently issued by the Board.

Although the accounting and traffic personnel provide services to other entities of Western, the Board is convinced that the accounting and traffic functions are an integral part of the broadcasting operations in Brandon and that these positions share a community of interest with those who are included in the bargaining unit. This panel subscribes to the Board's comments in Shamrock Television Systems Inc., CKOS-TV and CICC-TV (1987), 70 di 168; and 17 CLRBR (NS) 205 (CLRB no. 639). Referring to a group of accounting employees, the Board said this:

*"... whatever other services they may provide to other elements of Shamrock, the functions these people carry out, and the people themselves, are integrated into the operation of Shamrock's television broadcasting business, even though they are not peculiar to that business and are to be found in any business, whether federally regulated or not. There is no evidence that the 'office administration' of Shamrock can be viewed as anything separate, apart, distinctive or unique; it is simply part of Shamrock's Yorkton business and the employees on its particular roster are also employees like the others."*

(pages 175; and 212-213)

The Board concludes that, like the other persons whose inclusion in the unit is not contested, the accounting and traffic personnel are employees in the Brandon operations.

#### **Executive Secretary**

In its order dated October 23, 1990 the Board excluded the classification of executive secretary. The Board stresses that the exclusion relates to only one position, i.e. the position held by Ms. Shelley Appell. It is clear that the duties of the other "executive secretary" position do not meet the criteria set out in Bank of Nova Scotia, supra.

XI

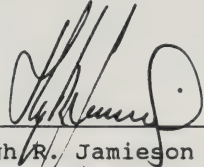
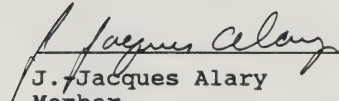
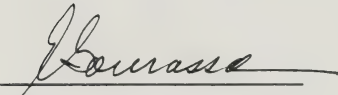
In summary, after examining the submissions of the parties, the evidence adduced at the hearing and the written arguments, the Board made the following findings.

(a) Two separate bargaining units are appropriate: one consisting of the employees of CHMI-TV and CKX-AM and CKX-FM at Brandon, and the other consisting of the employees of CHMI at Portage la Prairie and Winnipeg (Board file: 530-1843).

(b) The Board granted NABET's application for certification affecting the employer's CHMI operations. In rendering its decision, it was satisfied that the union had the support of the majority of the employees sought as of the date the application was filed. (Board file: 555-3048). A Board order to this effect has been issued.

(c) The following classifications are appropriate for inclusion in the existing bargaining unit covering the employees of CKX-TV, CKX-AM and CKX-FM: sports director,

farm director, assistant controller/payroll officer, building supervisor, accounting and traffic personnel (Board file: 530-1806). The Board issued an order amending the original certification.

  
\_\_\_\_\_  
Hugh R. Jamieson  
Vice-Chair  
\_\_\_\_\_  
J. Jacques Alary  
Member  
\_\_\_\_\_  
Evelyn Bourassa  
Member

DATED at Ottawa this 12th day of June 1991.



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## Summary

KEN SILVER, TIM KLEOVOULOS, KERN  
PAGEAU, GLORIA PAGEAU, COMPLAINANTS,  
UNITED STEELWORKERS OF AMERICAL, LOCAL  
5980, AND DOUG SOULIERE, RESPONDENTS,  
AND RIO ALGOM LIMITED, EMPLOYER.

Board File: 745-3736

Decision No.: 877

## Résumé de Décision

KEN SILVER, TIM KLEOVOULOS, KERN  
PAGEAU, GLORIA PAGEAU, PLAIGNANTS,  
MÉTALLURGISTES UNIS D'AMÉRIQUE,  
SECTION LOCAL 5980, ET DOUG SOULIERE,  
INTIMÉS, ET RIO ALGOM LIMITED,  
EMPLOYEUR.

Dossier du Conseil: 745-3736

N° de Décision: 877

This is a complaint under the duty of  
fair representation provisions in the  
Canada Labour Code (Part I -  
Industrial Relations). The grounds  
giving rise to the complaint go to the  
method used to establish relative  
seniority standing for purposes of  
lay-off. The four complainants  
grieved over this issue and the union  
grievance committee decided not to  
proceed with this grievance past the  
second step in the grievance-  
arbitration procedure. The grievance  
was therefore withdrawn.

The complaint was dismissed. The  
Board found that there was absolutely  
no grounds to support allegations of  
bias against the grievance committee.  
What this complaint boils down to is  
simply a dispute between the  
complainants and the union as to how  
certain provisions of the collective  
agreement should be interpreted. This  
in itself is not grounds for a  
complaint under section 37 of the  
Code.

Il s'agit d'une plainte fondée sur les  
dispositions du Code canadien du  
travail (Partie I - Relations du  
travail) relatives au devoir de  
représentation juste. Les motifs  
donnant lieu à la plainte ont trait  
à la méthode utilisée pour établir le  
statut relatif d'ancienneté aux fins  
de mise à pied. Les quatre plaignants  
ont déposé des griefs à ce sujet et  
le comité syndical chargé des griefs  
a décidé de ne pas porter le grief  
plus loin que le deuxième palier de  
la procédure de règlement des griefs.  
Le grief a donc été retiré.

La plainte a été rejetée. Le Conseil  
a jugé qu'il n'y avait absolument  
aucun fondement aux allégations de  
partialité portées à l'égard du comité  
chargé des griefs. La plainte n'était  
en fait simplement qu'une dispute  
entre les plaignants et le syndicat  
au sujet de la façon d'interpréter  
certaines dispositions de la  
convention collective. Une telle  
dispute ne constitue pas un motif de  
plainte fondée sur l'article 37 du  
Code.



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Labour  
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Board  
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Canadien des  
Relations du  
Travail

Reasons for decision

Ken Silver  
Tim Kleovoulos  
Kern Pageau  
Gloria Pageau,

*complainants,*

United Steelworkers of America,  
Local 5980, and Doug Souliere,

*respondents,*

and

Rio Algom Limited,

*employer.*

Board File: 745-3736

---

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and François Bastien, Members.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

Appearances:

The complainants appeared on their own behalf.

Mr. Dana Randall and Ms. Paula Turtle appeared on behalf of the respondents.

I

These reasons deal with a complaint under the duty of fair representation provisions contained in section 37 of the Canada Labour Code (Part I - Industrial Relations). The four complainants who are employed by Rio Algom Limited (the employer) at Elliot Lake, Ontario alleged in the complaint which was filed with the Board on August 25, 1990 that the United Steelworkers of America, Local 5980 (USWA or the union), had breached

its duty of fair representation by refusing to proceed to arbitration with a grievance they had filed over the way their seniority had been calculated.

Although the complaint named the union and its President, Mr. Doug Souliere, as respondents, the allegations were really aimed at a four-person grievance committee that had decided on or about August 2, 1990 that the complainants' grievance ought not to proceed further in the interests of the union's membership at large at Elliot Lake. When this dispute over the proper interpretation to be given to the seniority provisions in the relevant collective agreement arose in February 1990, the employer had given notice that a substantial portion of its operations at Elliot Lake were closing down and that lay-offs were imminent. Seniority was therefore a critical concern for the workers because those with the least seniority were obviously going to be the first to be laid off.

The relevant provisions of the collective agreement read as follows:

"ARTICLE 12 - SENIORITY

12.01

*There shall be two types of seniority, namely Section Seniority and Unit Seniority; which shall be defined below:*

- (a) Section Seniority is the relative ranking of employees established by length of service since the date of last starting work with the Company, subject to Section 12.15 herein.
- (b) Unit Seniority is the relative ranking of employees according to length of service in the bargaining unit, subject to Sections 12.13 and 12.15 herein.

12.02

- (a) *Those employees with the greatest Unit Seniority shall be given preference in promotion provided that any such employee is qualified to do the job and that they have the desire to do the work required.*
- (b) *Those employees with the least Section Seniority shall be the first to be laid off subject to the provisions of Section 12.15.*
- (c) *In any situation concerning an employee, other than promotion, in which seniority is a determining factor, Section Seniority only shall be used."*

(emphasis added)

At first glance these provisions appear to be quite straightforward; however, past practice and disputes over their application have caused a great deal of confusion in the minds of the union rank and file, particularly over whether section seniority which is the yardstick for lay-offs can include service with the employer accrued while working in other bargaining units.

To put this in its proper perspective we should explain that there are basically two bargaining units with separate collective agreements covering numerous work locations in and around Elliot Lake. The large unit is the Production and Maintenance unit (P&M) which is represented by USWA Local 5417, and the other unit which we are dealing with here is the Office and Technical Unit (O&T) represented by the respondent trade union. Over the years there has been a tendency for people working underground in the P&M unit to seek openings to move to surface jobs in the O&T unit. On occasions there has been movement the other way also. Some

employees have gone from O&T to P&M for example, to commence apprenticeship training.

Without going into too much detail, the history behind article 12 of the collective agreement is as follows: Up to about 1984, employees who moved from one unit to another took their section seniority with them. For example, Mr. Doug Souliere started working with the employer in the P&M unit in 1967 and moved to the O&T unit in 1969. Today, these two years of P&M seniority are reflected in his section seniority.

Around 1984, the executive of the P&M unit took the position that anyone transferring into that unit would not be allowed to carry their section seniority with them. While no one actually said so, it seems that the likely catalyst for this stance was the fact that there were lay-offs in 1984 where the formula to determine seniority standings was combined section service. Correspondence produced at the hearing into this complaint which was held at Elliot Lake on June 11 and 12, 1991, shows that there was an ongoing dispute on this subject between the two USWA locals throughout the following years and that it had not been resolved when the closure announcements were made in January 1990. The O&T executive did not accept that the wording of the P&M collective agreement allowed Local 5417 to deny full section seniority to O&T employees who moved to the P&M unit. The O&T people continued to acknowledge P&M seniority for employees who moved to the O&T unit. In fact, in 1989 the O&T executive went to arbitration on behalf of four P&M employees who transferred to O&T and for whom the employer refused to acknowledge full section seniority rights. This matter was settled on

a "without prejudice" basis in August 1989 with the employer conceding recognition for the combined P&M and O&T seniority for the four individuals involved. A letter acknowledging this settlement dated August 14, 1989 from the employer to the union ended with the following statement:

*"In the future any employee transferring from Local 5417 to Local 5980 will have their company seniority recognized for vacation and pension purposes only."*

As it turned out, between then and the time of this complaint, there was no movement from P&M to O&T, therefore, there was no opportunity for the union to challenge this stance by the employer.

That was basically the state of affairs when the employees became very seniority conscious as lay-offs suddenly loomed largely over their heads early in 1990. The employer's closure announcement meant that some 1800 jobs were being lost at Elliot Lake. For the O&T unit, it was rumoured that only some 50 of the existing 170 jobs would survive.

It was against that background that the complainants began their campaign in February 1990 to have the seniority provisions applied according to their views about how their relative seniority positions should be established. They took the position that company seniority, which is really section seniority as defined in the collective agreement, could only be used for vacation and pension purposes. According to the complainants, section seniority for lay-off purposes could not include service accrued in another bargaining

unit. Transfers would be treated like new hires. They wanted the union to determine the O&T seniority list for lay-off purposes solely on O&T service. Doug Souliere and the union executive disagreed with this interpretation, pointing to past practice which had resulted in many employees in the O&T unit carrying combined P&M and O&T seniority. The union's executive was supported in this interpretation by the USWA Staff Representative, Mr. Dave Mellor, whose responsibilities include the supervision of both local unions.

Again, without going into too much detail, the complainants eventually filed a grievance which the union allowed them to speak to on their own behalf to the employer at the second step of the grievance procedure. The grievance was denied by the employer.

In accordance with the normal procedures, the grievance then went to the union's grievance committee which has the responsibility to screen all grievances (other than policy grievances which commence at step three) and to decide whether they should or should not proceed to the next step. This committee consists of three elected officials plus the President who is an ex-officio member of all committees. In this instance, the grievance committee was made up of Messrs. Terry Whitehead, Ron Hurley and Gord Bradshaw who, along with President Doug Souliere, decided that the grievance was without merit and that it would be withdrawn. The main concern for the grievance committee was the effect of the interpretation sought by the four complainants in that it would deprive many members of seniority rights which they had accrued over the years working in both bargaining units.

It was this withdrawal of their grievance that the complainants allege constituted a breach of the union's obligations under section 37 of the Code. The complainants put particular emphasis on their allegation that the members of the grievance committee were biased because at least three of them held seniority rankings based upon combined O&T and P&M service. The complainants also said that the union had treated them shabbily after they had raised the seniority question. They claimed that they were unable to get a straight answer from the union executive nor were they allowed to pursue the issue at union meetings.

## II

Section 37 of the Code provides:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

It is well established that trade unions acting as exclusive bargaining agents need not take all grievances to a final disposition through arbitration. This discretion is, however, fettered by the imposition of certain standards of fair representation which were summarized by the Supreme Court of Canada in Canadian Merchant Service Guild et al. v. Gagnon et al. (1984), 84 CLLC 14,043:

"1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(page 12,188)

Applying these standards to the circumstances of this complaint, we are more than satisfied that there are simply no grounds to support a finding that the union's conduct somehow violated section 37 of the Code. What all of this really boils down to is a difference of opinion as to how certain provisions of the collective agreement should be interpreted and applied. This in itself is not grounds for a complaint under these provisions of the Code.

The Board has said often that it does not sit in appeal to decisions made by unions. The Board has also said it would not apply standards that could interfere with the need for trade unions to perform their daily tasks in an informal and non-legalistic way. This case is a prime example of the free collective bargaining process

in operation where all of the players, with the exception of USWA Staff Representative Dave Mellor, are part-time, elected and for all intents and purposes, unpaid union officials. Judicial standards which may be appropriate in other agency representation situations are simply not suited for these labour relations matters.

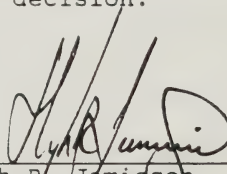
Here, the union presented its main evidence through Messrs. Souliere, Hurly and Bradshaw who played key roles in the demise of the complainants' grievance. Mr. Souliere testified about the history and past practice of the seniority provisions as well as the union's dealings with the complainants and the handling of their grievance. He also explained the union's rationale for deciding how it did. Messrs. Hurly and Bradshaw gave evidence about their role in the grievance committee decision to withdraw the grievance. (The fourth member of the committee, Mr. Whitehead, is no longer at Elliot Lake). These three witnesses were adamant that they had acted in good faith and in the best interests of the membership and that their own personal situations were never a consideration. We have absolutely no hesitation in accepting their evidence. Their testimony was forthright and their credibility was beyond doubt. There is simply nothing to support the allegations of bias against these union representatives and we so find.

As far as the union's treatment of the complainants, again, there was nothing in the evidence to show that this grievance by the complainants had been dealt with differently than any other grievances. Admittedly, amidst the tensions of the pending closures and the related pressures placed upon the local union executive,

there were more than likely some abruptness or curt responses from the union over the period of several months during which the complainants pursued their quest. This, however, is a reality of the workplace. People are not always polite to each other but this does not amount to unfair representation. One thing is clear though throughout this whole period, the union never waived from its position as to what it saw as the fair and proper application of the seniority provisions. It would have been relatively easy for these part-time union officials to have caved in under the pressure and come down on the side that favoured the majority of the members in the O&T bargaining unit, particularly since the P&M unit had stopped acknowledging reciprocal seniority. They did not, they stood their ground and did what they thought was right. For this, they should be commended.

Taking everything into consideration, the complaint is totally unfounded and it is dismissed accordingly.

The foregoing is a unanimous decision.



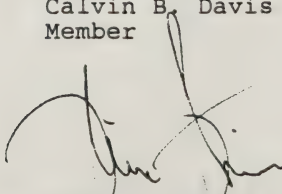
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Hugh R. Jamieson  
Vice-Chair



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Calvin B. Davis  
Member



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François Bastien  
Member

DATED at Ottawa this 25th day of June, 1991.

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## Summary

CANADIAN BROTHERHOOD OF RAILWAY,  
TRANSPORT AND GENERAL WORKERS ON  
BEHALF OF VERNON W. GILES,  
COMPLAINANTS, AND GLOBAL FORWARDING  
COMPANY LIMITED, RESPONDENT.

Board File: 745-3887

Decision No.: 878

## Résumé de Décision

LA FRATERNITÉ CANADIENNE DES  
CHEMINOTS, EMPLOYÉS DES TRANSPORTS ET  
AUTRES OUVRIERS, AU NOM DE VERNON W.  
GILES, PLAIGNANTS, ET GLOBAL  
FORWARDING COMPANY LIMITED, INTIMÉ.

Dossier du Conseil: 745-3887

N° de Décision: 878

This is an unfair labour practice  
complaint alleging that Global  
Forwarding Company Limited had  
terminated the employment of Vernon  
W. Giles because he was actively  
engaged in soliciting members for the  
union during an organizing campaign.

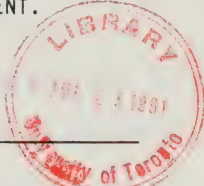
The complaint was dismissed. In its  
reasons, the Board reiterates the  
Board's policies applicable to this  
type of complaint. When weighing the  
evidence before it the Board observed  
that there were ingredients present  
to show that the employer had treated  
Vernon Giles differently vis-à-vis his  
working conditions because of his  
union activities in that he was  
deliberately dispatched on long-haul  
highway runs when his normal runs were  
confined to Nova Scotia and New  
Brunswick. The complaint could not  
be allowed however, because Vernon  
Giles had dishonestly switched  
dispatch papers at Toronto and had  
taken a run belonging to another  
driver so that he could return home  
to Dartmouth. The Board also had  
serious reservations about Vernon  
Giles' credibility.

In the circumstances, the Board was  
satisfied that Vernon Giles was no  
longer employed at Global Forwarding  
Company Limited because of his own  
behaviour, not because of his union  
activities.

Il s'agit d'une plainte de pratique  
déloyale de travail alléguant que  
Global Forwarding Company Limited a  
congedié Vernon W. Giles parce que  
celui-ci s'occupait activement de  
recrutement de membres pendant une  
campagne de syndicalisation.

La plainte a été rejetée. Dans ses  
motifs, le Conseil a répété ses  
politiques applicables à ce type de  
plainte. Lorsqu'il a examiné la  
preuve produite, le Conseil a remarqué  
que certains éléments démontraient que  
l'employeur avait traité Vernon Giles  
de façon différente, au chapitre des  
conditions de travail, en raison de  
ses activités syndicales, en ce sens  
que l'employeur lui donnait  
délibérément de longs parcours lorsque  
ses parcours habituels se limitaient  
à la Nouvelle-Écosse et au Nouveau-  
Brunswick. Toutefois, la plainte ne  
pouvait être accueillie parce que  
Vernon Giles avait agi de façon  
malhonnête en échangeant son avis de  
répartition à Toronto et en prenant  
un parcours qui avait été attribué à  
un autre chauffeur pour pouvoir  
retourner à Dartmouth. De plus, le  
Conseil met sérieusement en doute la  
crédibilité de Vernon Giles.

Dans les circonstances, le Conseil est  
convaincu que Vernon Giles avait perdu  
son emploi à Global Forwarding Company  
Limited en raison de son comportement,  
et non en raison de ses activités  
syndicales.



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Reasons for decision

Canadian Brotherhood of Railway,  
Transport and General Workers  
on behalf of Vernon W. Giles,

*complainants,*

and

Global Forwarding Company  
Limited,

*respondent.*

Board File: 745-3887

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The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Mr. Calvin B. Davis and Ms. Evelyn Bourassa, Members.

Appearances:

Messrs. Theo N. Stol and Al Maund for the complainants;  
and

Mr. Peter McLellan for the respondent.

The reasons for this decision were written by Vice-Chair  
Hugh R. Jamieson.

I

These reasons deal with an unfair labour practice complaint which was filed by the Canadian Brotherhood of Railway, Transport and General Workers (CBRT & GW or the union) on March 21, 1991. The union alleges in the complaint that Global Forwarding Company Limited (Global or the employer) terminated the employment of Mr. Vernon W. Giles because he had been engaged in trade union activities.

The employer denied the allegations, and efforts by the Board's officer to assist the parties to settle the matter being to no avail, the Board heard the complaint at Halifax on June 19-20, 1991.

## II

Global is a truck transportation company with routes extending from its home base at Dartmouth, N.S. to all points in Canada and all States in the USA. In addition to its Dartmouth operations, Global has a terminal at Markham, Ontario on the outskirts of Toronto. Since Global was formed in 1986, it has grown from a couple of tractors and 10 trailers to some 50 tractors and over 100 trailers. Approximately 30 of the tractors are company owned and are driven by company drivers. The others are operated under contract by owner-operators. Global is a family concern with its operations being run by Mr. Ron Clowes. His father, Leo Clowes, still dabbles in the business and his brother, Darren Clowes, runs the dispatch from Dartmouth, N.S.

Vernon Giles was employed by Global as a company driver from 1988 until February 3, 1991. He had previously driven under Global colours for an owner-operator. In September 1988, Mr. Giles became what is known as a local driver. As such he operated in Nova Scotia, New Brunswick and had an occasional trip into Maine. About October 1990, the vehicle used by Vernon Giles for local runs was changed to one equipped with a bunk. According

to Giles, this was done at his request because he found it more suitable for his longer trips where he could rest in the bunk rather than lying across the seats in the cab.

Although he was then equipped for long highway hauls, Mr. Giles claimed that he continued doing local runs until January 28, 1991 when he was suddenly dispatched to New Jersey, U.S.A. From there he was sent to Buffalo, New York and then to Toronto. After sitting in Toronto on January 31st he was given a trip on February 1, 1991 which was scheduled to be delivered to Shawinigan, Quebec on February 5, 1991. This meant he would have to stay in Toronto over the weekend. In the meantime, Giles said other drivers who arrived at Toronto after him were dispatched before him. In particular, one driver, Gunther Blagojevic, who only pulled into Toronto late on February 1, 1991, was assigned to take a load to Dartmouth. This was contrary to the usual dispatch rules which Mr. Giles says should have been on a first in, first out basis.

Adding to his troubles, Vernon Giles claims that he injured his shoulder on Friday, February 1, 1991 when he was tarping his Shawinigan load in preparation for departure on the following Monday. Later that afternoon he said that his injured shoulder had become more painful and he knew that he would not be able to take the Shawinigan run as he could not handle the tarps by himself. He claims that he called Darren Clowes at Dartmouth and complained about not being dispatched in proper order. He also said that he told Darren Clowes about his injured shoulder and that he wanted to bring the load that had been assigned to Gunther Blagojevic

back to Dartmouth. Darren Clowes was supposed to have told him in no uncertain terms not to touch the Dartmouth load but despite this, Giles did take the load to Dartmouth after switching his dispatch papers with those assigned to Gunther Blagojevic.

After having delivered the trailer to the client's premises early on Sunday morning (February 3, 1991) Giles returned the tractor to Global's yard at Dartmouth. The next day, Monday, February 4, 1991 he saw a doctor about his injured shoulder who prescribed a couple of weeks rest. Giles claims to have so informed the employer; however, when he picked up his paycheque three days later on Thursday, he was also handed a separation certificate which indicated that he had quit. Global claims that Giles had removed all of his personal belongings from his tractor when he returned it to the yard on February 3, 1991, therefore, it was assumed that he had quit after having brought the Dartmouth load back rather than completing his assigned Shawinigan run. In fact, Ron Clowes later testified that had Vernon Giles not quit, he would have fired him.

Vernon Giles denied that he had quit and both he and the CBRT & GW attribute the sudden change in his working conditions to his involvement in a union organizing campaign that was ongoing amongst Global employees at the time. Giles had been instrumental in bringing the union organizers into Global and he was openly active in recruiting union membership amongst Global employees. Apparently, a couple of drivers had informed Ron Clowes that Vernon Giles had attempted to have them sign union cards. Ron Clowes had supposedly been overheard telling Darren Clowes to get Giles out on the road and to keep

him out there, or words to that effect. The union claimed that Vernon Giles would still be working in his regular employment as a local driver had it not been for Global's actions against him because of his union activities.

### III

The union mentioned several sections of the Code in the complaint, however, section 94(3)(a)(i) is the most pertinent to the circumstances complained of:

*"94. No employer or person acting on behalf of an employer shall*

*(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person*

*(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,"*

The Board recently summarized its approach to this kind of complaint in Kleysen Transport Ltd. (1990), unreported CLRB decision no. 817:

*"In this type of complaint there is seldom direct evidence showing that an employer's actions are motivated by anti-union sentiments. The only party that usually has knowledge of why certain actions were taken is the employer itself. For these reasons the burden of proof is shifted to the employer by section 98(4) so that it is the employer who must satisfy the Board that its conduct was not anti-union motivated:*

'98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.'

The Board's approach to complaints under section 94(3)(a)(i) has been well documented. Anti-union motives need only be a proximate cause for employer action to be found to be a violation of section 94(2)(a)(i) of the Code. This policy was summarized by the Board in Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):

'The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) (now section 94(3)(a)) against an employee has been influenced in any way by the fact that the employee has, or is about to exercise rights under the Code then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:

'It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1) (now section 8(1)).

To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be

employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.

For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3) (now section 94(3)), he will be found to have committed an unfair labour practice.'

(Yellowknife District Hospital Society (1977), 20 di 281; 77 CLLC 16,083, at pages 284-285 and 16,549)

(Emphasis added)'

It can be seen from the foregoing that the Board takes its role very seriously when dealing with the protection afforded employees under section 94(3)(a)(i) and other sections of the Code where employers act to interfere with the rights of employees to freely select a bargaining agent and to participate in collective bargaining. (In this regard see also K.D. Marine Transport Ltd. (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400); Sedpex Inc. (1985), 63 di 102 (CLRB no. 543); and Canadian Imperial Bank of Commerce (1986), 65 di 1; 86 CLLC 16,023 (CLRB no. 564)). In these areas of employee freedoms the Board is quite prepared to act sheerly on inference. However, before the Board can find an employer to have contravened the Code, there has to be something from which the Board can draw the inference that anti-union motives played a part in the employer's actions. Moreover, even if there are circumstances prevailing which cast doubt on the employer's true motives, the employer always has the right and the opportunity to rebut the presumption which the Code imposes through section 98(4)."

(pages 9-10; emphasis added)

In this complaint there was ample evidence from which the Board could draw the inference that Global was indeed aware of Vernon Giles' union activities and that this did have an effect on how he was treated during the last few days of his employment. In fact, had this

complaint been limited to the sudden changes in Giles' working conditions and his dispatch to New Jersey, Buffalo, Toronto and Shawinigan, the Board would have probably found a violation of the Code and the remedy would likely have included an order to reinstate Giles as a local driver. Such a finding would have been based on our discomfort with the employer's explanation of the circumstances up to the point where Giles was dispatched to New Jersey on January 28, 1991.

For example, Ron Clowes testified that Giles had asked him for a truck with a bunk in October 1990 so that he could take highway runs to make more money. According to Mr. Clowes, Giles then took runs into the States on a regular basis. Documents produced at the hearing which included log books and time cards showed that this was not so. This incontrovertible evidence proved that Vernon Giles did continue as a local driver just as he claimed.

There was also evidence about other changes of working conditions at Global such as non-payment of statutory holidays over the Christmas and New Year period and, early in January 1991, drivers were suddenly prevented from taking their tractors home. The employer's explanations for these occurrences were not convincing, in fact, they sounded rather bizarre.

In any event, notwithstanding all of that, what did transpire on February 1 and thereafter prevents us from finding that Global terminated the employment of Vernon Giles for union activities as alleged. In this regard, it is the credibility of Mr. Giles that becomes suspect, not Global's.

IV

Attempting to discharge its burden under section 98(4) Global called three employees as witnesses as well as Messrs. Ron and Darren Clowes. Two of the employees, Gunther Blagojevic and Randy Hart, spoke about events that took place at Toronto on February 1 and 2, 1991. Mr. Blagojevic testified about the problems he had locating the load he was supposed to take from Toronto to Dartmouth on Saturday, February 2nd. When he arrived at the terminal in Markham he searched everywhere for the trailer and it was not until the afternoon on Saturday that he learned from Randy Hart that Vernon Giles had taken his assignment. Giles later testified that he had left a note in the dispatch box for Gunther Blagojevic informing him about switching loads. We have grave doubts that such a note ever existed.

Randy Hart, who is a relatively new employee at Global, told us about how he had spent Friday afternoon with Vernon Giles waiting for a dispatch. When they knew that they would be spending the weekend at Toronto they decided to share a hotel room. Global has a system for distributing cash advances to drivers who find themselves in this position and, according to Randy Hart who was unfamiliar with the system, Vernon Giles called Dartmouth and arranged for an advance of \$150.00 in U.S. funds. Hart said they then had trouble collecting the money because two numbers were missing in the code number Giles had been given by Dartmouth. A second phone call was then made to get a new number and the money was paid to them. Later, after Giles had called his wife and had decided that he was taking the other

load to Dartmouth instead of his Shawinigan assignment, Hart said that Giles gave him the cash advance and he used it for his hotel accommodation. Hart also said that Giles had not mentioned anything to him about an injury to his shoulder.

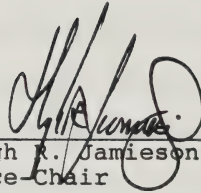
Randy Hart's version of what had taken place was totally contradicted by Vernon Giles. He admitted seeing Hart at a truck stop at Milton, Ontario on Thursday, January 31, along with other drivers of Global who were waiting for dispatch orders but he unequivocally denied having seen or spoken to Hart on Friday, February 1. Giles also testified that he obtained the cash advance in the forenoon and that he later returned the money to Darren Clowes on Monday, February 4th.

Darren Clowes testified that Vernon Giles had called him just before he left the office on Friday, February 1, 1991 seeking a cash advance. Later, Giles had called him back at home because he was having trouble with the code number. Apparently there were a couple of numbers missing. Not having access to code numbers at home, Darren Clowes said he had to make a call to the States to obtain a new number. This he did, giving Giles the new number when he called back about twenty minutes later. Ron Clowes testified that he too received a call from Giles about his problem with the cash advance. As the office was closed, he told Giles to contact Darren at home. Both Ron and Darren Clowes were emphatic that the cash advance was the only topic discussed during these phone calls and they denied that Giles said anything about his injured shoulder or about taking the Dartmouth load. Vernon Giles denied talking to Ron Clowes and his purported conversation with Darren Clowes

about his dispatch problems at Toronto and his wanting to take the Dartmouth load was supposed to have taken place much later in the evening. These three calls which the employer says Giles made were, however, recorded in a Maritime Tel & Tel computer printout which showed all calls originating from the calling card that was assigned to Giles' truck. While the actual conversations were not recorded, the times recorded and the length of the calls appear to corroborate the employer's version of the events. This, taken with the testimony of Randy Hart, causes us serious concerns about the veracity of Mr. Giles' evidence.

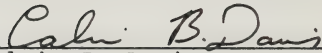
There were other serious credibility gaps in the testimony, particularly about the removal of Giles' personal belongings from his truck and also in the area of some alleged conversations between Giles and Global after he had seen his doctor on the Monday. The truth about what really happened during that period would be helpful to assess whether Giles quit or whether he was fired. However, considering what took place with the Dartmouth load on February 1, 1991, we have decided that there is no need to resolve these remaining credibility issues. We are satisfied that it is not because of his union activities that Vernon Giles is no longer employed by Global, it is because he took things into his own hands. Had Mr. Giles completed his assignments and returned to Dartmouth as he would have done in due course after the Shawinigan run instead of dishonestly switching dispatch papers and taking another driver's load so that he could get home, he would, as we said earlier, have had a valid complaint about the sudden changes in his work assignments. More importantly, all of the events where his credibility has been cast in

serious doubt would not have occurred. He did, however, choose the other way and, to coin a phrase, he was the author of his own misfortune. In these circumstances, the issue of whether he quit or was fired becomes irrelevant. The complaint simply cannot be allowed.



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Hugh R. Jamieson  
Vice-Chair



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Calvin B. Davis  
Member



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Evelyn Bourassa  
Member

DATED at Ottawa this 2nd day of July, 1991.

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## Summary

M.A. LADDS, COMPLAINANT,  
AMALGAMATED TRANSIT UNION, LOCAL  
279, RESPONDENT UNION, AND OTTAWA-  
CARLETON REGIONAL TRANSIT  
COMMISSION, EMPLOYER.

Board File: 745-3771

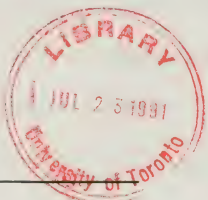
Decision No.: 879

## Résumé de Décision

M.A. LADDS, PLAIGNANT, LE SYNDICAT  
UNI DU TRANSPORT, SECTION LOCALE  
279, INTIMÉ, ET LA COMMISSION DE  
TRANSPORT RÉGIONALE D'OTTAWA-  
CARLETON, EMPLOYEUR.

Dossier du Conseil: 745-3771

No de Décision: 879



The Board found that the Amalgamated Transit Union, Local 279 (ATU), did not violate the "duty of fair representation" provision of the Canada Labour Code (Part I - Industrial Relations) when a general membership meeting decided not to send to arbitration the grievance of a former bus driver who had been dismissed.

The latter person was well-known among the employees of the Ottawa-Carleton Regional Transit Commission as a long-time opponent of the ATU. During 1990, he led a campaign by the Independent Canadian Transit Union to displace the ATU. He was dismissed by OC Transpo in July 1990. The Board traced the handling of his grievance by the responsible union officials through the three stages of the grievance process and found no sign that the ATU had breached the duty of fair representation.

The union's system is for the decision as to whether a grievance will be arbitrated to be made at one of the local's regular general monthly meetings. Although a legal opinion given to the membership assessed the chances of the grievance being won at 50 to 75 per cent, and despite the recommendation of the union president that the membership should accept the legal advice and send the matter to arbitration, the membership refused.

The Board attempted to understand why this decision was taken by the collectivity and in the process concluded that the general membership had not breached section 37 of the Code. In other words, there was no discrimination, arbitrariness or bad faith evident in the membership's approach to the matter.

Le Conseil a jugé que le Syndicat uni du transport, section locale 279 (SUT), n'avait pas enfreint l'article 37 du Code canadien du travail (Partie I - Relations du travail) lorsqu'à une réunion générale des membres il avait été décidé de ne pas renvoyer à l'arbitrage le grief d'un chauffeur d'autobus qui avait été congédié.

Les employés de la Commission de transport régionale d'Ottawa-Carleton savaient que ce chauffeur s'opposait depuis longtemps au SUT. En 1990, il avait dirigé la campagne menée par le Syndicat canadien indépendant du transport en vue de remplacer le SUT. En juillet 1990, OC Transpo l'avait congédié. Le Conseil a passé en revue la façon dont les représentants syndicaux avaient traité le grief aux trois paliers de la procédure de règlement des griefs et a jugé que rien n'indiquait que le SUT avait manqué à son devoir de représentation juste.

Selon la pratique du syndicat, toute décision quant à savoir si un grief sera renvoyé à l'arbitrage est prise aux réunions générales mensuelles de la section locale. Malgré une opinion juridique selon laquelle le grief avait de bonnes chances de réussite (50 à 75 %) et malgré la recommandation du président du syndicat que les membres devraient tenir compte de l'opinion juridique et porter le grief à l'arbitrage, les membres ont refusé.

Le Conseil a essayé de comprendre pourquoi cette décision avait été prise par le groupe et est arrivé à la conclusion que les membres n'avaient pas enfreint l'article 37 du Code. Autrement dit, les membres n'avaient pas agi de façon discriminatoire ou arbitraire et n'avaient pas fait preuve de mauvaise foi.

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Reasons for decision

M.A. Ladds,  
*complainant,*  
  
Amalgamated Transit Union,  
Local 279,  
*respondent union,*  
  
*and*  
  
Ottawa-Carleton Regional  
Transit Commission,  
  
*employer.*  
  
Board File: 745-3771

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The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Calvin B. Davis and Michael Eayrs.

Appearances:

Douglas D.G. Stel, assisted by Linda Hanson, for the complainant, M.A. Ladds;  
  
David J. Jewitt, for the respondent union, Amalgamated Transit Union, Local 279; and  
  
Roger Mills, for the employer, Ottawa-Carleton Regional Transit Commission.

These reasons for decision were written by Vice-Chairman Eberlee.

I

Michael A. Ladds was a bus driver for the Ottawa-Carleton Regional Transit Commission (OC Transpo) until he was dismissed July 17, 1990. The union which represents the drivers of OC Transpo, the Amalgamated Transit Union, Local

279 (ATU) took a grievance against the dismissal through three stages of the grievance procedure without convincing the employer to reinstate Mr. Ladds and then decided not to refer it to arbitration. Mr. Ladds had been for some time an opponent of the ATU and, in the two or three months preceding the dismissal, had taken on the leadership of a campaign by a rival union, the Independent Canadian Transit Union (ICTU), to win bargaining rights away from the ATU. In essence, his belief was that the ATU had decided not to take his grievance to arbitration because of his anti-ATU stance. He complained to the Board on October 23, 1990 that the ATU's handling of, and decision to drop, his grievance constituted a failure in the union's "duty of fair representation" and was a violation of section 37 of the Canada Labour Code (Part I - Industrial Relations). Section 37 reads as follows:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

A hearing was held in Ottawa on February 27 and 28, and May 14 and 15, 1991.

## II

Mr. Ladds had worked for OC Transpo since 1976. While he was always a member of the ATU, from 1982 onwards he played leading roles in the various campaigns by the ICTU to displace the ATU. His support for the ICTU was well known throughout the membership of ATU Local 279.

OC Transpo dismissed him on July 17, 1990 for allegedly misusing sick leave. A colleague, Paul D'Aoust, was also dismissed for the same reason. A grievance was filed and was discussed with the employer at the three stages of the grievance process, the last stage occurring on September 4, 1990. Mr. Ladds was represented by union officers at the various steps, including Local 279's president Randy Graham at the third stage. The evidence shows Mr. Ladds was careful to hold the union to the strict letter of the grievance procedure and that the union was scrupulous in its handling of the matter up to and including the third step. There is no evidence of any breach of section 37 by the union during this period.

On September 10, 1990, Local President Graham gave notice to John Bonsall, General Manager of OC Transpo, that Mr. Ladds wished to proceed to arbitration, reminded Mr. Bonsall that the union membership would decide whether the matter would in fact be arbitrated and thanked Mr. Bonsall for putting the matter "in abeyance" until a membership decision had been reached.

While the union's behaviour cannot be faulted during the first three stages of the grievance process, the evidence indicated a certain dilatoriness on Mr. Ladds' part in respect of co-operating with the union to fight his own case. This was alluded to, on September 10, 1990, in a letter from Local President Graham to Mr. Ladds. Mr. Graham wrote as follows:

"Dear Brother Ladds,

*This letter is a follow-up to our conversation on Tuesday, September 4th, 1990, prior to and after your grievance meeting. To date, I have not received a complete written report from you, as was requested from you on July 17th, 1990 and again on September 4th, 1990, concerning the allegations.*

*I have also not received the medical evidence which you indicated your lawyer provided the Commission, but declined to provide to us.*

*My letter to you on August 1st, 1990, indicated the need for your co-operation and I am perplexed as to why you would not be more helpful in trying to assist us in resolving your grievance.*

*I trust that you will provide us with the necessary information as soon as possible, including the name of your independent Counsel, so we might be able to handle this matter in a co-operative manner. This information is necessary for our Lawyer to be able to provide a recommendation to the Membership.*

Fraternally,

(signed)

Randy Graham  
President/Business Agent"

Under the union's rules and practices, before a decision to send a grievance to arbitration is made by the membership, an opinion is obtained from legal counsel as to the merits of the grievance. The executive board of the union then considers the matter and finally it is referred for consideration at the next regular meeting of the local's membership. Usually the executive board makes a recommendation for or against arbitration. During the summer months, when local membership meetings are suspended, the executive board has the authority to determine whether a grievance will go to arbitration. In this case, because the third stage was not concluded until early September, the summer hiatus was over and the matter was one to be dealt with at a regular membership meeting.

The legal opinion from the union's counsel was provided on or about October 5, 1990. Aware that the opinion was on its way, the union advised Mr. Ladds by registered mail dated October 3, 1990 that the October local union meeting, to be held on Thursday, October 11, 1990 at 8:00 p.m., and continuing on the next day at 10:30 a.m. for those who would be working the Thursday evening shift, would consider his grievance and whether it should be sent to arbitration. Mr. Ladds did not receive this letter because he had moved around September 26, 1990 from the home address he had provided to the local, without giving the union notice of a change in his address as he was required to do by the union rules.

The Board does not see that the union can be blamed in any way for the letter not reaching him. In any case, Mr. Ladds knew that the union usually held its monthly meetings on the second Thursday evening of each month (with a repeat of the meeting the next morning). He testified that he knew in September when the October meeting would take place. It is most unlikely that he was really taken by surprise when he was told on October 10, 1990 outside OC Transpo headquarters, while he was seeking support for the ICTU, that the meeting where his grievance would be considered would be the next evening. He was aware soon after September 10 that a legal opinion was being prepared and that the matter would be considered by the union at the October meeting or at the November meeting at the latest.

Mr. Ladds would have the Board conclude that the ATU deliberately gave him as little notice of the meeting as possible in order to ensure that he would have no time to line up supporters to attend the union meeting and vote to send his grievance to arbitration. However, the evidence is clear that Mr. Ladds was chiefly responsible for the fact that he did not receive the notice of the meeting. Moreover, the evidence indicates that he knew the union meeting would likely be on October 11. Thus the Board does not believe that this claim against the ATU has validity.

In summary, up to the point of the commencement of the union meeting on the evening of October 11, 1990, there was no evidence, in the Board's opinion, of any violation of section 37 of the Code - no sign of anything arbitrary, discriminatory or in bad faith - in the way that the officials of Local 279 comported themselves in their handling of the case of Mr. Ladds.

According to the latter, early in the October 11 meeting, somebody moved a motion, which was approved, to suspend regular business and to proceed at once to consider whether the grievance of Mr. Ladds and that of another OC Transpo employee should go to arbitration. (There was no particular significance in this procedure.) The legal opinion was read in its entirety to the membership. (A copy of the opinion was supplied to the Board but by agreement of the three parties it was not - and will not be - disclosed to the employer, OC Transpo. It is sufficient here to note that it is three and one-half pages of single-spaced, closely reasoned analysis. It concluded with the opinion that Mr. Ladds' chances of being

reinstated by an arbitrator were 50 to 75 per cent.)

Again according to Mr. Ladds, Local 279 President, Mr. Graham, stated to the meeting that the executive board would not be making a recommendation to the membership because it did not have a consensus on whether the grievance should be arbitrated. Mr. Ladds told the Board that he was then given an opportunity to state his case; he referred, among other things, to the severity of the penalty of dismissal that was meted out to him. He testified that Mr. Graham also spoke about the penalty being too severe for the alleged crime.

The Friday morning meeting followed the same pattern. The total attendance at both sessions from a union membership of some 1,800 persons was under 150. The final count was 64 to send Mr. Ladds' grievance to arbitration; 80 against.

Mr. Ladds told the Board that the Thursday evening meeting consisted mainly of ATU supporters. He felt the vote was not so much on the merits of his grievance as it was directed against the ICTU. He readily conceded that the union's normal system of handling grievances is for them to be discussed with the employer's representatives at each of the three stages, for legal opinions to be obtained and for the question of whether they are to be sent to arbitration to be determined by a vote of the membership at one of the regular monthly local meetings. He told the Board that he could not remember any other instances where complaints have been made about this system. Mr. Ladds

maintained that the union executive usually makes a recommendation for or against going to arbitration as part of the presentation to a local meeting. In his case, the executive made no recommendation and this, he felt, had a negative effect on the members.

Randy Graham, president of Local 279, testified to the effect that many of the members of the executive board believed the company's evidence to support its dismissal of Mr. Ladds was so strong as to make it unlikely that he would be reinstated by an arbitrator. Mr. Graham felt that the best course was to persuade the executive to refrain from making any recommendation at all, rather than to come out against arbitration. He thought that this, at least, would minimize the chances of the membership going against Mr. Ladds' case. He personally advised the members that he concurred with the legal opinion that there was a 50 to 75 per cent chance of success at arbitration.

It is clear from the testimony of all witnesses that at the meetings themselves no public statements were made or opinions expressed or attacks made against Mr. Ladds and his grievance. No mention was made of his anti-ATU involvements. Mr. Ladds was asked whether he would still bring charges of some kind against the ATU if the grievance went to arbitration and the arbitrator rejected it. Mr. Ladds' reply was somewhat uncompromising: he said he would not refrain from exercising any rights he might have.

Mr. Ladds' colleague, Paul D'Aoust, who was also dismissed by OC Transpo for the same alleged infraction, testified that he sensed an atmosphere of bad feeling at the meeting he attended, although he was unable to be specific. He saw several people there whom he had not noticed before at union meetings and assumed they had been persuaded especially to attend.

Mr. D'Aoust's grievance against his dismissal was dealt with at the November general meeting. On this occasion there was also no executive board recommendation pro or con arbitration. Because Mr. D'Aoust had a less satisfactory work record than Mr. Ladds, the union's counsel expressed a considerably less favourable opinion as to his chances of winning reinstatement. Nevertheless, the membership voted to send his case to arbitration. Mr. D'Aoust felt this was largely because he had plenty of time to enlist supporters to attend the November meetings. It is worth noting, also, that these meetings took place after Mr. Ladds had filed his complaint with the Board.

The Board heard considerable testimony about actual efforts by Ladds supporters to persuade members to attend the meeting to vote to send Mr. Ladds' case to arbitration; on the other hand, there was no solid evidence presented to support any claims that similar endeavours to get out the vote were made by those who did not favour arbitration. While various witnesses, who were subpoenaed on behalf of Mr. Ladds, spoke about members talking privately among themselves at the meetings in opposition to sending the case to arbitration, nobody named specific persons who were so engaged.

On the other hand, several witnesses recalled anti-Ladds statements made some time before the October general meetings by one of the union officials, James Haddad. For example, Louis Brulé, a driver, heard Mr. Haddad say to several other drivers that he felt Messrs. Ladds and D'Aoust were guilty of defrauding the sick leave plan and deserved to be fired. When taken to task for commenting on their case, Mr. Haddad was said to have added that "these guys were bad-mouthing the union".

Pierre Goyette, another driver, told the Board that Mr. Haddad said Mr. Ladds went fishing when he was supposed to be sick and that he (Haddad) felt OC Transpo had an airtight case against Mr. Ladds. André Tondreau heard another member of the executive, Dale Jackson, say derogatory things about Messrs. Ladds and D'Aoust.

It may very well be that Mr. Haddad opposed sending Mr. Ladds' grievance to arbitration not so much on its merits - or lack of merits - as on Mr. Ladds' attitude toward the ATU. That could be read into the alleged statement: "these guys were bad-mouthing the union". If Mr. Haddad alone - and not the general membership of the union - had had the authority under the constitution to decide Mr. Ladds' fate, the Board might have wondered, from this evidence, whether the decision not to go to arbitration were tainted with some factors contrary to section 37. But Mr. Haddad, although a union executive who undoubtedly wielded some influence, was only one vote out of many at the October general meetings. Bus drivers are not known to be timid souls who are easily led; they normally do their own driving. Thus it seems unlikely to the Board that Mr. Haddad's alleged statement can be taken as somehow

representing the thinking of the entire group who voted against Mr. Ladds.

On the other side of the "influence" scale, there was President Graham. He told the union meetings that he agreed with legal counsel's opinion that the Ladds case should go to arbitration. Yet, the membership rejected his advice.

According to Robert Simpson, another OC Transpo driver, the October 11 session which he attended was no different in procedure or atmosphere from any other where they discussed the question of whether a grievance would be arbitrated. Nothing was said by anybody concerning Mr. Ladds' opposition to the ATU and support for the ICTU. The whole question concerned the merits of Mr. Ladds' grievance. Many questions were asked concerning the fishing trip and why Mr. Ladds took it while on sick leave. Mr. Simpson felt, in the final analysis, that the dismissal was warranted. He felt Mr. Ladds' answers to the various questions were "evasive, smug and insincere".

### III

Mr. Ladds' fate was decided not by an individual or by a committee, but by the general membership. It is true that the turn-out for the October meetings was not impressive in terms of numbers - but union meetings are seldom overwhelmed by high attendance. The Board doubts that there was any significant degree of stacking of these particular meetings by pro or con Ladds forces. The evidence suggests, in fact, that the gatherings on the Thursday night and Friday morning were a fairly standard

cross-section of those who usually made the effort to attend union general meetings. The evidence also shows that outwardly the meeting was a reasonably civilized affair. There was no anti-, or pro-, Ladds rabble-rousing, no lynch-mob scene.

The ATU "system" is to let the general membership decide whether a matter should go to arbitration. When, as is the case with many other unions, such a matter is decided by an individual or by a committee, it is somewhat easier to obtain an understanding of why a particular course of action was adopted and followed. Thus can the Board attempt to come to an assessment of the motivation and the behaviour involved in terms of whether the union seems to have acted arbitrarily, discriminatorily or in bad faith.

Direct democracy is considerably more opaque. It is impossible to obtain a picture of what was in the minds of each of the 80 people who voted not to send Mr. Ladds' grievance to arbitration and to understand readily why they took that course of action? The best that can be done is to make an over-all assessment of the context which produced the result. That context has already been described. There is nothing in the resulting picture that shows obvious signs of discrimination, arbitrariness or bad faith on the part of the union.

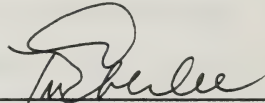
Some might argue that, almost by definition, a decision by a union general membership, affecting somebody who is opposed to that particular union and is seeking to displace it, will violate some or all of the criteria having to do with the rationality of the decision-making process and of the decision itself that emerges from the process.

However, that would be carrying cynicism about the fairness of direct democracy to an unacceptable extreme. In the Board's opinion, there is nothing wrong per se with a system under which the whole membership decides whether a matter will go to arbitration. Of course, the system can work perversely; any system can.

With direct democracy, there is the potential for a meeting to degenerate into a mob scene and to spawn a highly irrational conclusion simply because those present don't like somebody or what he stands for and have chosen to ignore the real merits of an issue affecting him. But there is no evidence that such happened in this case.


The Board concluded that the whole process, up to the October meetings, was without any indication of any violation of section 37. Local 279's system then was for the matter to go before the general membership. The latter could either send the grievance to arbitration or refuse to do so. It was their choice. They decided, despite the legal opinion, and the expressed judgment of the union president, not to opt for arbitration. The Board has some evidence as to what was in the minds of individuals who took part in the decision-making process: Mr. Ladds' supporters voted for arbitration, not particularly because they felt his grievance had merit but apparently because they were Ladds supporters. How rational were they on the merits of the grievance? There is no evidence as to how Mr. Haddad voted, if he did vote, but presumably he voted as he had spoken. Mr. Simpson's reaction was perhaps close to that of the majority of people who attended the meetings.

Absent from the total picture here is any hard evidence that the union violated section 37 in its handling of Mr. Ladds' grievance. To find merit in Mr. Ladds' complaint, this Board would have to jump too far and too recklessly toward such a conclusion. It would have to assume, in the absence of any direct evidence, that the 80 people who voted against him did so for reasons contrary to section 37. This Board cannot find a basis for such a conclusion and therefore dismisses the complaint.



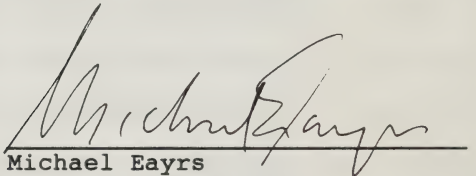
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Thomas M. Eberlee  
Vice-Chairman



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Calvin B. Davis  
Member of the Board



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Michael Eayrs  
Member of the Board

DATED at Ottawa, this 28th day of June 1991.

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## Summary

THOMAS I. REID AND JOHN TAYLOR,  
COMPLAINANTS, AND UNITED MINE  
WORKERS OF AMERICA, DISTRICT NO.  
26, AND LOCAL 2268, AND CERTAIN  
OFFICERS OF BOTH DISTRICT NO. 26  
AND LOCAL 2268, RESPONDENTS.

## Résumé de Décision

THOMAS I. REID ET JOHN TAYLOR,  
PLAIGNANTS, AINSI QUE LES MINEURS  
UNIS D'AMÉRIQUE, CONSEIL DE  
DISTRICT NO 26 ET SECTION LOCALE  
2268, ET CERTAINS DE LEURS  
DIRIGEANTS, INTIMÉS.

Board File: 745-3777

Dossier du Conseil: 745-3777

Decision No.: 880

No de Décision: 880

Two employees of the Cape Breton  
Development Corporation (Devco) who  
are members of the United Mine  
Workers Union (UMW) refused to  
engage in strike duty in support of  
an illegal strike at Devco's coal  
mines in August and September 1990.  
As a result, the union did not give  
them strike pay, which totalled  
approximately \$600 for each person  
who supported the strike.

Deux employés de la Société de  
développement du Cap-Breton  
(Devco), membres du syndicat des  
Mineurs unis d'Amérique (MUA), ont  
refusé de faire la grève pour  
appuyer la grève illégale en cours  
en août et septembre 1990 dans les  
mines de charbon. Par conséquent,  
le syndicat ne leur a pas versé  
l'indemnité de grève de près de  
600 \$ accordée à chaque personne  
qui avait appuyé la grève.

The two persons complained to the  
Board that by withholding from them  
a share of the union's strike fund  
because they did not support the  
illegal strike, the union penalized  
them for refusing to perform an act  
that was contrary to the Canada  
Labour Code (Part I - Industrial  
Relations), contrary to section  
95(h) of the Code.

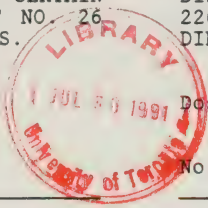
Les deux employés se sont plaints  
au Conseil que, en ne leur donnant  
pas leur part de la caisse de grève  
parce qu'ils n'avaient pas appuyé  
la grève illégale, le syndicat les  
avait pénalisés pour avoir refusé  
de poser un geste qui était  
contraire au Code canadien du  
travail (Partie I - Relations du  
travail), en violation de l'alinéa  
95h) du Code.

The majority of the Board panel  
agreed and ordered the union to pay  
\$600 to each of the complainants.

La majorité des membres siégeant en  
l'espèce était de même avis et a  
ordonné au syndicat de verser la  
somme de 600 \$ à chacun des  
plaignants.

One of the members of the panel  
dissented. He was in complete  
disagreement with the view that to  
refuse to pay strike pay to union  
members because they have not  
physically participated in picket  
line activities can be construed as  
the imposition of a penalty within  
the meaning of 95(h) of the Code.  
He feels that the question of who  
receives strike pay is a matter for  
the union to decide. He further  
felt that the majority has isolated  
the phrase "or impose any form of  
penalty on an employee" from the  
rest of the section and has  
interfered with the true intent of  
95(h). He would dismiss the  
complaint.

Un membre était dissident. Il  
n'accepte pas du tout le point de  
vue de la majorité selon lequel le  
fait de refuser de verser  
l'indemnité de grève à des  
personnes parce que celles-ci  
n'avaient pas participé aux  
activités de piquetage pouvait être  
considéré comme une sanction au  
sens de l'alinéa 95h) du Code. Il  
estime que c'est le syndicat qui  
décide qui reçoit l'indemnité de  
grève. En outre, il estime que la  
majorité a isolé l'expression «ou  
de lui imposer une sanction  
quelconque» du reste du libellé et,  
dans son interprétation de l'alinéa  
95h), en a altéré la portée  
véritable. Il rejetterait la  
plainte.



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Reasons for decision

Thomas I. Reid and  
John Taylor,

*complainants,*

*and*

United Mine Workers of  
America, District No. 26,  
and Local 2268, and certain  
officers of both District  
No. 26 and Local 2268,

*respondents.*

Board File: 745-3777

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The Board consisted of Vice-Chairman Thomas M. Eberlee and  
Members Calvin B. Davis and Michael Eayrs.

Appearances:

Thomas I. Reid and John Taylor, complainants, representing  
themselves; and

Blaise MacDonald, representing the respondents.

These reasons for decision of the majority were written by  
Vice-Chairman Eberlee. Mr. Davis dissents; his reasons are  
appended.

I

Thomas I. Reid and John Taylor are employees of the Cape  
Breton Development Corporation (Devco) and members of the  
United Mine Workers Union (UMW). They did not support the  
work stoppage in August and September 1990, at Devco's coal  
mines in the Sydney, N.S. area. This stoppage was  
determined by the Board to be an illegal strike on or about  
August 18, 1990; the Board issued an order requiring  
employees to cease engaging in the stoppage and to return

to their normal work duties. The illegal strike continued until September 20, 1990.

Every member of the UMW who performed "strike duty" (see Article VI, Section 6 of the union constitution) throughout the stoppage was paid a total of \$600.00 (\$100.00 per week) by the union out of the District 26 strike fund. Messrs. Reid and Taylor refused to perform "strike duty" and were not paid benefits from the strike fund. They filed a complaint with the Board on or about October 26, 1990, alleging that the union had thus violated section 95(h) of the Canada Labour Code (Part I - Industrial Relations). A hearing was held in Sydney on May 2, 1991.

Section 95(h) of the Code reads as follows:

*"95. No trade union or person acting on behalf of a trade union shall*

*...*

*(h) expel or suspend an employee from membership in the trade union or take disciplinary action against or impose any form of penalty on an employee by reason of that employee having refused to perform an act that is contrary to this Part; ..."*

## II

Neither Mr. Reid nor Mr. Taylor was represented by counsel at the hearing. Mr. Taylor opened his presentation of his case by reading a statement from which we extract the following:

*"I am a union member and I am not on any vengeance hunt. It is my firm belief that I was penalized by my union by their refusal to pay benefits to which I contributed. The interpretation of the word "penalty" is of much importance in this issue. Section 95h states you should not be penalized for refusing to perform an act which is contrary to this part. I believe I was penalized by being refused benefits during the dispute. The dictionary defines "legality" as the quality of being legal. On August 18, 1990 this*

*Board issued an order which stated the striking members were in violation of the Canada Labor code. This was ignored by the union and members were informed if they didn't take part in this illegal dispute they would be denied benefits which they are obliged to pay into. Article VI section 2 of the District 26 Constitution says the monies collected from the members is "To be drawn upon exclusively for the purpose of aiding members engaged in strikes and in case of lock out related to strikes. Article VI section 6 to my understanding states if you don't do strike duty during a strike, without providing just cause, to the local union you aren't entitled to strike benefits. Both these sections of the constitution are fair if they apply in a legal strike. How can they be used against members who do not wish to take part in an illegal dispute?*

*[sic]"*

The Board was told by Ray Holland, president of District 26, which encompasses the six UMW locals in the Sydney area, that the union's strike fund was set up in 1982. The Board is not clear precisely how much of UMW members' regular dues go each month to District 26 and to the particular local covering particular groups of members. However, the rules of the "District 26 Strike Fund" provide that the local must deposit \$1.00 per member per month into the fund and the district matches this with a further 50 cents. Messrs. Reid and Taylor are regular dues-paying members of the union and have thus contributed to the strike fund.

As has been stated, the rules of the union allow persons to receive benefits from the strike fund only if they do "strike duty during a strike" - unless they provide just cause to their union local for not performing strike duties. The latter do not appear to be defined except in the rules governing the strike fund where paragraph 4 says: "A striking member must do picket duty or any other duty assigned by the Local Union to be eligible to receive benefits from this 'Fund' unless excused by Local Union

executive." The rules make no distinction between legal and illegal strikes.

Despite the Board's finding on August 18, 1990 that the strike was contrary to section 89 of the Code, the stoppage continued. On August 30, as provided in the UMW constitution, a meeting of the District Executive Board and the president and secretary-treasurer of each local union authorized the payment from the fund of \$100.00 per week in strike benefits "starting Friday, August 31, 1990, and continuing each Friday until the balance is distributed." At that point, the fund contained \$1,136,812.34. (This is taken from the minutes of the meeting.) The minutes also state that, "... All U.M.W.A. members who perform picket duty will qualify for the strike pay. ... Strike pay must be picked up by U.M.W.A. members in person only. ..."

Mr. Reid testified that he was telephoned soon after August 18 by Sandy Gillis, on behalf of the union, who asked him to stand on the picket line. His reply was: "No way." He knew the strike was illegal and he wanted to go back to work. He actually went through the picket line a couple of times. He would have gone to work had he been called. He did not contact Devco management. Had they called him, he would have turned up for work immediately. Mr. Reid said he did not make an attempt to collect strike pay at the location where it was being handed out because he had been told he would not get it since he had refused to do strike duty.

Mr. Taylor's experience was similar. His wife received a telephone call from someone representing the union. She and he had discussed the stoppage and he had determined

that he would not support it. She passed this message on to the union caller, on his behalf. Mr. Taylor wanted to go back to work, although he did show up on the picket line on two nights at the beginning of the stoppage. Thereafter, he did not do strike duty because he opposed the strike. He did not present himself for strike pay.

### III

Only rarely has the Board been called upon to deal with complaints under section 95(h). Indeed the only previous case where the Board has actually found a union in violation of section 95(h) was Terry Matus (1980), 37 di 73; [1980] 2 Can LRBR 21; and 80 CLLC 16,022 (CLRB no. 211). Mr. Matus was a member of Local 502 of the International Longshoremen's and Warehousemen's Union. During a period when there was little work for him to do as an ILWU member on the docks at New Westminster, he obtained a job at a nearby manufacturing plant where he was required to be a member of the union (not the ILWU) which represented employees at that operation. The rules of Local 502 provided that one of the "obligations" of membership was: "Not to belong to any other Trade Union." Mr. Matus was expelled from the ILWU for belonging to another trade union. The Board found that this provision in the rules of the ILWU local was contrary to Part I of the Code and that the effect of its application to Matus by way of expulsion was prohibited by section 185(h) (now 95(h)).

ILWU Local 502 brought a review application to the Board (see Terrance John Matus) (1980), 41 di 278; and [1981] 1 Can LRBR 115 (CLRB no. 269). Another panel of the Board rejected the review application.

Both the original decision and the review application were themselves reviewed by the Federal Court of Appeal and were upheld. (See International Longshoremen's and Warehousemen's Union, Local 502 v. Terrance John Matus et al., [1982] 2 F.C. 549; (Matus No. 1) and [1982] 2 F.C. 558; (Matus No. 2) (1981), 129 D.L.R. (3d) 616; and 82 CLLC 14,161.) In the final analysis, however, the Court's decision to uphold the Board's determinations was based on reasons other than those having to do with the Board's application of section 185(h) (now 95(h)) to Mr. Matus' case. Indeed, some members of the Court expressed doubts about the reasonableness of the Board's interpretation of section 185(h). But this did not affect the bottom line of their decision.

One question determined by the Court in the foregoing matters is, however, highly relevant to the instant case. It was argued by counsel before the Court of Appeal that sections 185(e), (f) and (h), (now 95(e), (f) and (h)) were beyond the legislative competence of Parliament. In his opinion, Pratte, J., stated:

*"The applicant's submission on that first issue is easily summarized. The relations between employers and employees is a matter of property and civil rights which, prima facie, is within the exclusive legislative jurisdiction of the provinces pursuant to subsection 92(13) of the British North America Act, 1867, 30 & 31 Vict., C.3 (U.K.) [R.S.C. 1970, Appendix II, No.5]. If the Parliament of Canada has nevertheless been held to have the competence to enact the Canada Labour Code, it is because that Code applies only to employees employed in connection with undertakings that are within the legislative authority of Canada and because the determination of the conditions of work of those employees has been considered a vital part of the operation of the federal undertakings. The authority of Parliament to enact labour legislation therefore flows from its authority to regulate the operation of federal undertakings. However, according to counsel for the applicant, paragraphs 185(f) and (h) cannot be considered as being legislation regulating, either directly or indirectly, the operation of federal undertakings; these provisions, said he, regulate the relations between trade unions and their members, a*

matter which is within the exclusive provincial jurisdiction.

That argument must, in my view, be rejected. The authority of Parliament in the field of labour relations is not limited to the direct determination of the conditions of work of persons employed in connection with federal undertakings; it extends to the enactment of legislation appropriate to establish 'a system of collective bargaining and statutory provisions for settlement of disputes in labour relations'. [In re the Validity and Applicability of the Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529, per Estey J., at page 564.] Trade unions are a necessary element of such a system. For that reason, the Parliament of Canada has, in my opinion, the authority to legislate so as to ensure that persons employed in connection with federal undertakings are not unjustly deprived of their right to join the union of their choice. This, in my view, is the purpose of paragraphs 185(f) and (h)."

(Matus No. 1, supra, pages 553; 619-620; and 83)

Verchere, D.J., concurred. The opinion of Urie, J. was somewhat similar, although he related it more specifically to the meaning of union membership in the context of the longshoring industry, (see Matus No. 2, supra, pages 565-567; 624-626; and 88-89).

At the hearing in Halifax on May 2, 1991, counsel for the UMW also argued that section 95(h) is outside the legislative competence of Parliament. He maintained that the policy of not paying strike benefits to persons like Messrs. Reid and Taylor, who refused to perform strike duty, was strictly an internal union matter, having nothing to do with the actual employment of these persons or the representation of these persons in employment by the UMW.

It appears to the Board, however, that the decision of the Federal Court of Appeal and particularly the opinion of Pratte, J., in the Matus cases upholds quite explicitly the power of Parliament to legislate at least part of section 95(h) - that part encompassed in the words "expel or

suspend an employee from membership in the trade union ..... by reason of that employee having refused to perform an act that is contrary to this Part." While the Court did not have to deal specifically with the concept contained in the other portion of the section - that a union shall not "take disciplinary action against or impose any form of penalty on an employee by reason of that employee having refused to perform an act that is contrary to this Part," it would be difficult to conclude that "disciplinary action" or "any form of penalty" were so different from expulsion or suspension that Parliament could not legislate in respect of them, as well. Expulsion or suspension from union membership are nothing more nor less than "disciplinary action" and a "form of penalty" of a specific kind. Their consequences may in fact be less costly to the individual than discipline or penalization. The Board believes that the reasoning of Pratte, J., can and should be applied to the whole of section 95(h) and that it was within the legislative competence of Parliament to enact the section and it is within the power of this Board to apply it.

#### IV


In the instant case, the strike of UMW members against Devco in August and September 1990 was contrary to Part I of the Code. By refusing to engage in the illegal strike through the performance of "strike duty" on the picket line or elsewhere, the two complainants, Messrs. Reid and Taylor, "refused to perform an act that is contrary to this Part." The union, by withholding certain sums of money from them in the course of distributing the contents of the strike fund, imposed a form of penalty on them. The net

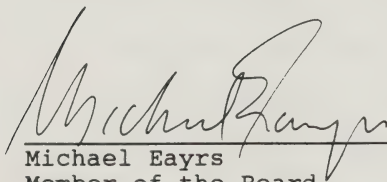
result is that the union violated section 95(h) of the Code.

Under the remedial powers given to it by section 99, and particularly 99(f), the Board orders the respondents in this matter to:

1. cease contravening section 95(h), and
2. pay to Messrs. Reid and Taylor each \$600 they would have received had they not "refused to perform an act that is contrary to this Part."

The Board will remain seized of this matter in order to deal with any questions that may arise in connection with the foregoing orders and in order to issue a formal order should such be necessary.

  
\_\_\_\_\_  
Thomas M. Eberlee  
Vice-Chairman

  
\_\_\_\_\_  
Michael Eayrs  
Member of the Board

DATED at Ottawa, this 28<sup>th</sup> day of June 1991.



Dissenting Reasons of Member Calvin B. Davis

I have read the majority decision and I find myself in complete disagreement with my colleagues' views that to refuse to pay strike pay to union members because they have not physically participated in picket line activities can be construed as the imposition of a penalty within the meaning of paragraph 95(h) of the Code. It is my respectful opinion that the question of who receives strike pay is a matter for the union to decide, depending on the circumstances and the interpretation of the union's constitution and by-laws. Any disagreement with the union's ruling can be the subject of an appeal through the internal union process; it is not something that should be decided by the Board.

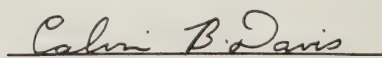
In my view, the complainants did not refuse to participate in the unlawful strike which was contrary to the code. What they refused to do was picket duty. Neither one of them contacted management indicating their desire to go back to work. Mr. Taylor actually showed up a couple of nights on the picket line. The complainants withdrew their services the same as the other strikers albeit in their situation grudgingly. Therefore they too were participating in the unlawful strike. Picketing is not regulated by the code; so any refusal to picket cannot be found to be an act that is contrary to Part I, which is a prerequisite for a violation of paragraph 95(h) of the Code.

What my colleagues have done is to isolate the phrase "or impose any form of penalty on an employee" from the rest of the section, this cannot be done in my respectful opinion, without interfering with the true intent of paragraph 95(h). Taking the section as a whole, it appears to me that the word "penalty" in the context of

these provisions, is linked to the exercise of the union's internal disciplinary powers, and as such the intent of the section is directed towards the prohibition of disciplinary action and penalties flowing from such action which might be taken against members for refusing to participate in unlawful activities. Expulsion and suspension are two of the penalties which are spelled out in the section. There was no disciplinary action taken here by the union, and I find it difficult to stretch these provisions to cover what is really a dispute over who is entitled to strike pay. The strike pay was not meant as an incentive for the members of the union to go down to the picket line and do some picketing. The same rules would have applied even if it was a legal strike. Even when there is a legal strike there is often those that disagree with the strike, and those that refuse to picket. They too would have been denied the strike pay or made some other arrangements to become eligible to collect it. To be denied strike pay because of a failure to perform assigned tasks cannot, in my opinion, be construed as imposing a penalty within the meaning of paragraph 95(h) of the Code.

I would dismiss the complaint.

As this case turns on the interpretation and application of the Code, I would invite the union to utilize the Board's review procedures to have this whole question answered by the Board sitting in a plenary session.

  
Calvin B. Davis  
Member of the Board

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## Summary

## Résumé de Décision

VICKY OLSON, SOPHIE ZEHNER, AND  
ALEX R. BOIVIN, COMPLAINANTS, AND  
CANADIAN UNION OF POSTAL WORKERS,  
RESPONDENT.

VICKY OLSON, SOPHIE ZEHNER ET ALEX  
R. BOIVIN, PLAIGNANTS, ET LE  
SYNDICAT DES POSTIERS DU CANADA,  
INTIMÉ.

Board Files: 745-3531  
745-3598

Dossiers du Conseil: 745-3531  
745-3598

Decision No.: 881

No de Décision: 881

In these cases, the Canadian Union  
of Postal Workers imposed  
suspensions of membership on three  
persons employed by Canada Post  
Corporation who had refused to give  
up office in the Letter Carriers  
Union of Canada.

En l'espèce, le Syndicat des  
postiers du Canada (le SPC) a  
imposé des suspensions à trois  
employés de la Société canadienne  
des postes parce qu'ils avaient  
refusé de renoncer à leur poste de  
dirigeant au sein de l'Union des  
facteurs du Canada.

The three persons complained to the  
Board that CUPW had violated  
various provisions of the Canada  
Labour Code (Part I - Industrial  
Relations) in that the suspensions  
constituted, among other things,  
discriminatory application of  
membership rules and of standards  
of discipline.

Les trois personnes se sont  
plaintes au Conseil que le SPC  
avait enfreint diverses  
dispositions du Code canadien du  
travail (Partie I - Relations du  
travail), en ce sens que les  
suspensions constituaient notamment  
une application discriminatoire des  
règles d'adhésion et des normes de  
discipline.

The Board reminded the parties that  
it has always interpreted the Code  
so as not to interfere with unions  
in their utilization of membership  
discipline in order to protect  
themselves from challenges by  
rivals. The panel did not consider  
that the discipline meted out to  
one of the complainants (a six-  
month suspension from membership)  
violated the Code. However, one  
similarly situated person was given  
a five-year suspension and another  
was given a lifetime expulsion.  
The Board considered that, in  
comparison with the discipline  
imposed upon the first person,  
these latter two suspensions were  
in themselves discriminatory and in  
violation of section 95(g) of the  
Code.

Le Conseil a rappelé aux parties  
qu'il a toujours interprété le Code  
de façon à ne pas s'ingérer dans  
les affaires du syndicat, notamment  
dans l'imposition de mesures  
disciplinaires pour se protéger  
d'associations rivales. Le Conseil  
n'a pas jugé que la mesure  
disciplinaire imposée à l'un des  
plaignants (une suspension de six  
mois du syndicat) enfreignait le  
Code. Toutefois, une personne dans  
une situation semblable avait reçu  
une suspension de cinq ans et une  
autre avait été expulsée du  
syndicat. Le Conseil a jugé que,  
par rapport à la mesure imposée à  
la première personne, la suspension  
imposée aux deux autres plaignants  
était discriminatoire et  
enfreignait l'alinéa 95g) du Code.

CUPW was ordered to rescind these  
suspensions and re-admit the two  
persons to membership forthwith.

Le Conseil a ordonné au SPC  
d'annuler les suspensions et de  
réintégrer les deux personnes dans  
le syndicat.

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Canadien des  
Relations du  
Travail

Reasons for decision

Vicky Olson,  
Sophie Zehner, and  
Alex R. Boivin,

*complainants,*

*and*

Canadian Union of  
Postal Workers,

*respondent.*

Board Files: 745-3531  
745-3598

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The Board consisted of Vice-Chair Thomas M. Eberlee and Members Michael Eayrs and Mary Rozenberg.

Appearances:

Shona A. Moore, for the complainants; and  
Donald Crane, for the respondent.

These reasons for decision were written by Vice-Chairman Eberlee.

I

Vicky Olson and Sophie Zehner are employees of Canada Post Corporation in the Vancouver area. They were expelled from membership in the Canadian Union of Postal Workers for allegedly refusing to sever their ties as officers of the Letter Carriers Union of Canada. Alex R. Boivin was a Canada Post employee in Vancouver until February 3, 1990. He, too, was expelled, but for a considerably shorter period, for declining to give up office in the Letter Carriers Union.

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Reasons for decision

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All three complained to the Board that the Canadian Union of Postal Workers had violated sections 95(f), (g), (h) and 96 of the Canada Labour Code (Part I - Industrial Relations). These sections read as follows:

*"95. No trade union or person acting on behalf of a trade union shall*

*...*

*(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;*

*(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union;*

*(h) expel or suspend an employee from membership in the trade union or take disciplinary action against or impose any form of penalty on an employee by reason of that employee having refused to perform an act that is contrary to this Part; or*

*...*

*96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."*

A hearing was held in Vancouver on May 28 and 29, 1991.

## II

In 1988, another panel of the Board decided that it was appropriate to merge into one bargaining unit, the various units of Canada Post employees then represented by the Canadian Union of Postal Workers (CUPW), the Letter Carriers Union of Canada (LCUC) and several smaller employees' organizations. A vote was held early in 1989 to determine whether CUPW or LCUC would represent all of the employees in the new merged unit. CUPW won the bargaining rights. LCUC remained in existence, although it no longer represented any persons in collective bargaining.

During the early part of 1989, LCUC held a convention in Sudbury, Ontario, and arising from this event undertook an unsuccessful challenge of the process and the decisions which had led to CUPW becoming the bargaining agent for the merged unit.

CUPW responded by labelling the LCUC a "rival" organization and by declaring the active participation of members or officers of CUPW in the alleged anti-CUPW activities of LCUC as a conflict of interest. A resolution was adopted by the National Executive Board of CUPW in August, 1989 requiring any officer of CUPW to withdraw from membership in LCUC and any member of CUPW to resign any office held in LCUC. The resolution also warned that any member of CUPW "who supports, advises or encourages the LCUC or works with LCUC in its activities against CUPW will be subject to charges under article 8 of the National Constitution".

Vicky Olson, a letter carrier, was president of Letter Carriers Union Local 209 in Abbotsford, when LCUC ceased to be the bargaining agent for the employees and CUPW won the vote. She did not resign from this position and considered that it was appropriate for her to continue to hold it in order to act as a sort of trustee maintaining the assets of LCUC, which are not inconsiderable.

Early in 1989 Ms. Olson was elected a delegate to the CUPW area council. She acted as a shop steward and was moderately active in CUPW affairs. But she also maintained an involvement with LCUC affairs, including the office of local president, and attended the Sudbury convention in June, 1989.

In November, 1989, CUPW created a new local in the Fraser Valley to serve Mission and Abbotsford. She was nominated for the executive but was refused the right to stand when she declined to make a declaration dissociating herself from LCUC.

On December 7, 1989, charges were brought against Ms. Olson and a hearing was held by the Pacific Region Disciplinary Committee. Ms. Olson was given notice of this hearing but she refused to attend. The Committee found her guilty of the charges and decided to suspend her from membership in CUPW for five years. Ms. Olson did not appeal this decision and the suspension because of "disgust" over the way CUPW had treated her and because she was afraid the National Appeal Board might enlarge the period of suspension.

Sophie Zehner's situation was virtually identical to Ms. Olson's. She, too, is a letter carrier and at the time of the CUPW take-over of bargaining rights was president of Local 264 of LCUC at Mission, B.C. She was active in CUPW affairs after early 1989. Like Ms. Olson, she attended the Sudbury LCUC convention and later refused to renounce her LCUC office. She was charged and "tried" at a hearing before the CUPW Pacific Region Disciplinary Committee, also in April, 1990 and was later advised that she was expelled from the union for life. She did not file an appeal with the National Appeal Board, largely for the same reasons that Ms. Olson did not appeal.

Mr. Boivin was a member of the large LCUC Local 12 in Vancouver and its third vice-president at the time CUPW was

certified to represent the merged unit in Canada Post. He continued to hold this office, but early in 1989 was elected a member-at-large of the CUPW executive. He was selected as an "LCUC appointee" on the joint committee that had to re-write the CUPW by-laws in the light of the new bargaining unit situation. Later in 1989, he became chairman of this committee.

In August, 1989, Mr. Boivin received a letter from the Local CUPW president advising him that the National Executive Board of CUPW had declared LCUC a rival organization and that unless he resigned from it he would be in a conflict of interest and CUPW would impose an emergency suspension on him. He refused to resign from LCUC and was given that emergency suspension.

On November 21, 1989 he was brought to trial before the Pacific Region Disciplinary Committee for not giving up his LCUC connection while holding office in CUPW. He resigned from Canada Post on February 3, 1990. It was not until almost a month later that he received the decision of the Disciplinary Committee. This found him guilty of the charges brought against him and imposed on him a six-month suspension from CUPW, running from October 4, 1989. Why the CUPW bureaucratic machine continued to grind away when the man was no longer an employee of Canada Post and thus not a member of CUPW was not explained at the time to Mr. Boivin, nor to the Board during the hearing.

Mr. Boivin, however, felt that what CUPW had done to him blackened his reputation and he sought to clear his name by filing an appeal with the National Appeal Board of the union. This time around, the union determined that it

could not entertain his appeal because he was then no longer an employee and thus was not a union member.

### III

The Board was told by Ron Kucey, president of New Westminster local of CUPW, that it was not the policy of CUPW to try to prevent CUPW members from holding other union membership at the same time. The situation that CUPW was trying to protect itself against was conflict of interest. This could arise from a person holding office in LCUC while being a member of CUPW, or holding office in CUPW while also being a member of LCUC, or holding office in both and membership in both. Larry Honeybourne, Pacific Region grievance officer, testified that CUPW did not really care if rank and file members also held membership in LCUC. The difficulty was that LCUC was challenging CUPW's bargaining rights and there could be no confidential CUPW discussions about strategies and tactics if CUPW members could also be LCUC officers or vice versa and in a position to report back to LCUC.

The Board agrees that CUPW had the right to seek to protect itself from the challenge posed at the time by LCUC and that the policy referred to above was not in principle contrary to the Code. The Board's jurisprudence in respect of the application of sections 95(f) and (g) of the Code has been ably summarized in Paul Horsley et al. and Canadian Union of Postal Workers, 1991, (CLRB No. 861), and does not need to be repeated here.

While the Board sympathizes with Mr. Boivin's wish to have his name cleared, it considers his case to be largely

academic in that he had in fact ceased to be an employee of Canada Post by the time the Pacific Region Disciplinary Committee issued its decision. However, had he continued to be an employee, the Board would not have interfered with that decision. In the Board's opinion, the union did not violate section 95(f) of the Code; it did not apply to him in a discriminatory manner the membership rules of the trade union. Nor did it apply to him in a discriminatory manner the standards of discipline of the trade union, in contravention of section 95(g). And, in the Board's opinion, there was nothing contrary to Part I of the Code in CUPW seeking to protect itself by demanding that he, as an executive member of CUPW, withdraw from office and membership in LCUC. Hence, there was no violation of section 95(h) by CUPW. Finally, the Board finds no violation of section 96 in the union's treatment of Mr. Boivin - assuming that a union can be deemed a "person" in section 96, which is a very large assumption and something that this panel is not at all sure about.

The Board finds, therefore, that Mr. Boivin's complaint (File 745-3598) must be dismissed.

Having dealt with Mr. Boivin in this fashion, it hardly seems fair to him to use his treatment by the union as a sort of yardstick against which to measure and judge that which was done to Ms. Olson and Ms. Zehner. Yet, this is where logic leads us.

#### IV

At the hearing, the Board asked for an explanation of the difference in the length of the suspensions given to the

three complaints: six months in Mr. Boivin's case; five years to Ms. Olson and life to Ms. Zehner. It was pointed out that all three were similarly situated in that they held office in LCUC and refused to give it up. The sole identifiable difference between Ms. Olson and Ms. Zehner - which surely had nothing to do with the disparity in their respective treatment by the Pacific Region Disciplinary Committee - was that Ms. Olson refused to attend the hearing and was suspended for five years and Ms. Zehner did attend (and was outspoken) and was turfed out for life.

Mr. Honeybourne was unable to explain the differences. He also told the Board that as far as he knew, the Committee had no criteria for determining what was an appropriate sentence. The Board learned from him that the differences in sentences could not have occurred because there were different sentencing authorities in each case. The personnel of the Pacific Region Disciplinary Committee was virtually the same for all three cases.

In the Board's opinion, the suspension given to Mr. Boivin was not contrary to the Code and presumably was regarded by the union committee as falling within the region of what might be called a reasonable standard of discipline. Considering the fact that Mr. Boivin, Ms. Olson and Ms. Zehner were what may be described as "similarly situated", the five-year suspension given to Ms. Olson was so out of line in comparison with Mr. Boivin's as to be discriminatory in character. Thus, the Board believes that the union violated section 95(g) in its treatment of Ms. Olson by applying to her in a discriminatory manner the standards of discipline of the trade union. Compared with the six-month suspension of Mr. Boivin and the five-year

suspension of Ms. Olson, the lifetime withholding of CUPW membership from Ms. Zehner was wildly out of kilter and also appears to have violated section 95(g).

Before deciding whether it can go any farther, the Board must consider the question of whether section 97(4) should be applied in this matter. That section reads as follows:

*"97.(4) Subject to subsection (5), no complaint shall be made to the Board under subsection (1) on the ground that a trade union or any person acting on behalf of a trade union has failed to comply with paragraph 95(f) or (g) unless*

*(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the trade union and to which the complainant has been given ready access;*

*(b) the trade union*

*(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or*

*(ii) has not, within six months after the date on which the complainant first presented his grievance or appeal pursuant to paragraph (a), dealt with the grievance or appeal; and*

*(c) the complaint is made to the Board not later than ninety days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint."*

While Mr. Boivin sought and was denied the opportunity to appeal to the National Appeal Board, neither Ms. Olson nor Ms. Zehner took advantage of the union's appeal procedure. As was mentioned earlier, one of Ms. Olson's reasons for not taking this step and for coming to the Board with this complaint was that she was afraid her five years might be extended. This fear was not without a basis in fact. In the Horsley matter, supra, the National Appeal Board radically extended the discipline which had been imposed

by the Pacific Region Disciplinary Committee. This record does not give the Board confidence that the National Appeal Board would not have increased the penalty in Ms. Olson's case.

Section 97(5) creates exceptions to the limitation imposed by section 97(4). It reads as follows:

*"97.(5) The Board may, on application to it by a complainant, hear a complaint in respect of an alleged failure by a trade union to comply with paragraph 95(f) or (g) that has not been presented as a grievance or appeal to the trade union, if the Board is satisfied that*

*(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or*

*(b) the trade union has not given the complainant ready access to a grievance or appeal procedure."*

Thus the Board has discretion to entertain and determine complaints concerning violations of sections 95(f) and (g). The provision is worded in such a broad way as to suggest that Parliament intended it to be applied very much on the basis of common sense.

In this instance, having been made fully aware of the "action or circumstance" giving rise to the complaint of Ms. Olson and Ms. Zehner and having observed the rather obvious fact that the union did apply to them in a discriminatory manner its standards of discipline, the Board considers there would be little point in sending these two ladies, after all this time, on a long detour by telling them to go to the National Appeal Board to see if it will do the right thing about their discipline. The point is that the complainants are here before this Board at this time (and a great deal of time has passed since

they were disciplined); the Board has heard all of the evidence of both the complainants and the respondent, and all of their arguments concerning the complaints, as well as on the point of whether section 97(4) is applicable; moreover, the Board does consider that the Code has been violated. Thus it would be wiser for the Board to deal with the complaint now, without delay. This is not in conflict with Decision No. 773, Paul R. Gillis et al and Canadian Union of Postal Workers, (1990), where the complainants had already appealed to the National Appeal Board and the matter was scheduled to be heard by it very shortly. In that case, the Board felt there was no point in applying the discretion of section 97(5); it decided that, since the union's appeal procedure had already been invoked by the complainants, it would be preferable for the Board to stand aside and allow that system to play itself out. This case, as has been indicated above, is quite a different situation.

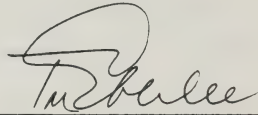
V

The Board finds that in its discipline of Ms. Olson and Ms. Zehner, CUPW violated section 95(g) of the Code. Under the power granted to it by section 99(1)(f), of the Code, the Board orders CUPW to rescind the five-year suspension of Ms. Olson and the lifetime expulsion of Ms. Zehner and to re-admit them forthwith to membership in the union, and to accord to them the benefits of such membership, without requiring of them any penalty or payments beyond the payment of the regular union dues.

The Board will remain seized of this matter in order to determine any questions which may arise in connection with

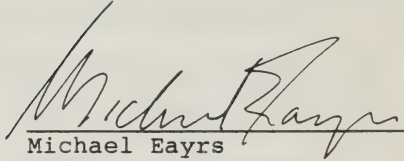
the implementation of the foregoing order and to issue a formal order should such become necessary.

Since the Board has found that there was a violation of section 95(g) in respect of the treatment of Ms. Olson and Ms. Zehner, and has ordered remedies, there is no need to make findings in respect of the allegations that CUPW's conduct toward them violated sections 95(f), (h) or 96.



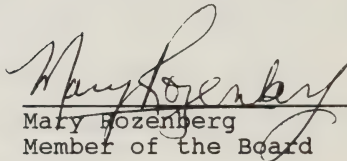
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Thomas M. Eberlee  
Vice-Chair



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Michael Eayrs  
Member of the Board



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Mary Rozenberg  
Member of the Board

DATED at Ottawa, this 8<sup>th</sup> day of July 1991.

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## Summary

NATIONAL BANK OF CANADA, APPLICANT  
AND THE SYNDICAT DÉMOCRATIQUE DES  
EMPLOYÉS DE BANQUE DE LA RÉGION  
SAGUENAY LAC ST-JEAN (CSD),  
RESPONDENT.

Board File: 530-1963

Decision No.: 882

## Résumé de Décision

BANQUE NATIONALE DU CANADA,  
PLAIGNANTE ET LE SYNDICAT  
DÉMOCRATIQUE DES EMPLOYÉS DE BANQUE  
DE LA RÉGION SAGUENAY LAC ST-JEAN  
(CSD), INTIMÉ.

Dossier du Conseil: 530-1963

No de Décision: 882

In this decision, the Board must  
deal with an application for review  
filed by an employer, the National  
Bank of Canada (the Bank), pursuant  
to section 18 of the Canada Labour  
Code (Part I - Industrial  
Relations), seeking reconsideration  
of an earlier decision of the  
Board, Banque Nationale du Canada,  
Jonquière-Kénogami (1991), as yet  
unreported CLRB decision no. 872.

In the latter decision, the Board  
had granted the request of the  
Syndicat démocratique des employés  
de banque de la région Saguenay Lac  
St-Jean (CSD) to include part-time  
employees in the bargaining unit.

The Board addresses the application  
by reminding the parties of the  
role of a summit panel which is  
first to study the file to ensure  
there is no inconsistency in the  
interpretation of the Code or in  
the application of its relevant  
policies to determine whether to  
refer the matter to a plenary  
session of the Board, to the  
original panel for reconsideration  
or to reject the application.

In the instant case, the Board  
finds no such inconsistency or new  
facts or questions which had not  
been considered by the original  
panel.

Furthermore, the Board finds that  
the errors imputed to the original  
panel by the Bank relate to the  
interpretation of the evidence  
adduced, which is in itself a mere  
question of fact.

The Board finally reiterates that a  
party's disagreement with a  
decision rendered by the original  
panel does not constitute  
sufficient reason to justify an  
application for review of said  
decision.

The employer's application is  
therefore dismissed.

Dans cette décision, le Conseil  
doit trancher une demande de  
révision d'un employeur, la Banque  
Nationale du Canada (la Banque),  
fondée sur l'article 18 du Code  
canadien du travail (Partie I -  
Relations du travail) ayant pour  
objet le réexamen d'une décision  
antérieure du Conseil, soit Banque  
Nationale du Canada, Jonquière-  
Kénogami (1991), décision du CCRT  
n° 872, non encore rapportée.

Dans cette dernière affaire, le  
Conseil avait accédé à la demande  
du Syndicat démocratique des  
employés de banque de la région  
Saguenay Lac St-Jean (CSD)  
d'inclure à l'unité de négociation  
les employés temporaires.

Le Conseil aborde la demande en  
rappelant le rôle d'un banc de  
révision qui est de faire une étude  
préalable du dossier pour s'assurer  
qu'il n'y a pas d'incohérences dans  
l'interprétation du Code ou dans  
l'application des politiques qui en  
découlent et de décider que  
l'affaire soit renvoyée à une  
réunion plénière du Conseil, ou au  
banc de membres initial pour  
réexamen ou la demande est rejetée.

En l'espèce, le Conseil constate  
l'absence d'une telle incohérence  
ou encore de faits nouveaux ou de  
questions qui n'auraient pas été  
traités par le banc de membres  
initial.

De plus, le Conseil constate que  
les reproches de la Banque à  
l'endroit du banc initial se  
rapportent plutôt à  
l'interprétation de la preuve  
présentée, ce qui ne demeure en soi  
qu'une simple question de faits.

Le Conseil rappelle enfin que le  
fait qu'une partie est en désaccord  
avec une décision du banc initial  
n'est pas un motif suffisant pour  
justifier une demande de révision  
de cette décision.

La demande de l'employeur est donc  
rejetée.

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Canadien des
Relations du
Travail

## Reasons for decision

National Bank of Canada,  
*applicant,*  
*and*  
 Syndicat démocratique  
 des employés de banque  
 de la région Saguenay-  
 Lac St-Jean (CSD),  
*respondent.*

Board File: 530-1963

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Messrs. Hugh R. Jamieson and J. Philippe Morneault, Vice-Chairmen.

### Appearances:

Mr. John A. Coleman, for the applicant;  
 Mr. Peter Bradley, for the respondent.

These reasons for decision were written by Mr. J. Philippe Morneault, Vice-Chairman.

These reasons deal with an application, made pursuant to section 18 of the Canada Labour Code, to reconsider the Board decision in National Bank of Canada, Jonquière-Kénogami (1991), as yet unreported CLRB decision no. 872, issued on May 9, 1991 (hereinafter referred to as decision no. 872).

Decision no. 872 was issued further to an application for certification by the Syndicat démocratique des employés de banque de la région Saguenay-Lac St-Jean (CSD) (the union) to represent all employees of the National Bank of Canada (the bank) working at the branches located at 3880 Harvey boulevard, Jonquière, and 3799 Roi-Georges Street, Kénogami. The bank, the employer, objected to the description of the proposed bargaining unit and to the inclusion of certain

categories of persons (specifically the temporary employees) in the bargaining unit. In an interim decision, the Board certified the union based on the bargaining unit proposed and reserved the right to amend the description of the bargaining unit after hearing the parties on the question of exclusions. The union and the bank both participated in a public hearing, and decision no. 872 sets forth the Board's reasons for including the temporary employees in the bargaining unit.

On May 24, 1991, the bank filed this application for reconsideration on the following grounds:

*"First, the Board asked the wrong question in that it analysed the use made of temporary employees in general throughout the National Bank of Canada instead of limiting itself to the actual use being made of the five temporary employees employed by the National Bank at its Jonquière branch on April 18, 1990. ...*

*...*

*Second, the test developed by the Board panel, namely, 'the extent to which the temporary employees are integrated into the bank's normal and customary operations,' is totally illogical in that this test is the test applied to determine whether someone is in fact an employee. ...*

*Finally, it should be noted that the employer never argued or in any way suggested that the question of the inclusion of the temporary employees should be the subject of collective bargaining rather than a Board decision. ..."*

(translation)

In its reply to this application, the union alleged that the Board panel that issued decision no. 872 had not made any errors.

This application was referred to this panel meeting in camera as a reconsideration panel, in accordance with the Board's review policies as developed in British Columbia Telephone Company (1979), 38 di 124; [1980] 1 Can LRBR 340; and 80 CLLC 16,008 (CLRB no. 220); Wardair Canada (1975)

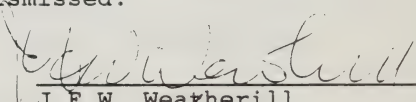
Ltd. (1983), 53 di 184; and 84 CLLC 16,005 (CLRB no. 434); Brewster Transport Company Limited (1986), 66 di 133; and 86 CLLC 16,045 (CLRB no. 580); Canadian Broadcasting Corporation (1987), 70 di 132; and 17 CLRBR (NS) 43 (CLRB no. 636); Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640); and CanWest Pacific Television Inc. (CKVU) (1991), as yet unreported CLRB decision no. 847.

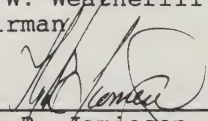
The primary function of a Board reconsideration panel consists in doing a preliminary analysis that enables it to detect the presence and significance of inconsistencies in interpreting the Code or applying the resulting policies and to decide whether the circumstances warrant referring the questions to a plenary session of the Board, referring the case back to the original panel for reconsideration, or dismissing the application (see Wardair Canada (1975) Ltd., supra, and Brewster Transport Company Limited, supra).

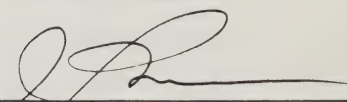
Although the grounds cited by the bank in its application allege errors of law and deviation from the policies established by past Board decisions in Bank of Montreal, Sherbrooke, Quebec (1987), 69 di 102; 19 CLRBR (NS) 112; and 87 CLLC 16,044 (CLRB no. 621), and Canadian Imperial Bank of Commerce (Powell River Branch) (1991), 91 CLLC 16,014 (CLRB no. 843), an examination of the impugned decision no. 872 reveals, on the contrary, that these policies were correctly applied by the original panel. Consequently, there is no reason to refer the case to a plenary session of the Board. The grounds cited by the bank would seem to allege rather that the original panel ignored or incorrectly interpreted the evidence adduced or drew incorrect conclusions from it. All these questions are questions of fact.

The facts in the instant case were placed before the original panel through viva voce evidence produced at the hearing, and the panel drew from this evidence the conclusions it deemed appropriate. This is within the province of the panel that holds a hearing. An application to reconsider such a decision must raise facts or considerations that were not brought to the attention of the original panel at the hearing and give the reasons why these facts were not brought to its attention. Moreover, these facts or considerations must be such that, had the original panel had knowledge of them, it would have issued a different decision (see Canadian National Railways (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41); and Pacific Western Airlines Ltd. (1983), 52 di 178; and 5 CLRBR (NS) 260 (CLRB no. 444)).

In the instant case, we have been unable to identify any new fact, consideration or issue that was not dealt with by the original panel. The bank's application is rather the expression of its disagreement with the original panel's decision and of its dissatisfaction. The Board has consistently held that an application for reconsideration cannot be based on these grounds alone. The bank's application is therefore dismissed.

  
J.F.W. Weatherill  
Chairman

  
Hugh R. Jamieson  
Vice-Chairman

  
J. Philippe Morneault  
Vice-Chairman

ISSUED at Ottawa, this 24th day of July 1991.

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## RÉSUMÉ

Robert Emard, plaignant, la Fraternité  
canadienne des cheminots, employés des  
transports et autres ouvriers, intimée, et  
Canadian National, employeur.

Dossier du Conseil: 745-3501  
Décision n° 883

## SUMMARY

Robert Emard, complainant, the Canadian  
Brotherhood of Railway, Transport and  
General Workers, respondent, and  
Canadian National, employer.

Board File: 745-3501  
Decision no. 883

Le plaignant allègue que le syndicat a  
manqué au devoir de représentation juste  
prévu à l'article 37 du Code canadien du  
travail (Partie I - Relations du travail) en  
refusant de donner suite à son grief en  
conformité avec la procédure de règlement  
des griefs et d'arbitrage prévue dans la  
convention collective.

Le Conseil a jugé que le syndicat a  
adopté une attitude négligente en  
acceptant la version de l'employeur au  
sujet de la prescription du grief sans  
vérifier les faits pertinents auprès de  
l'employé. En outre, le syndicat n'a  
procédé à aucune enquête, avant de  
décider que les précédents en semblable  
matière devaient s'appliquer en l'espèce.

Le syndicat a traité le grief du plaignant  
de façon superficielle et négligente,  
contrevenant au devoir de représentation  
juste.

The complainant alleged that the union  
had breached its duty of fair  
representation in violation of section 37  
of the Canada Labour Code (Part I -  
Industrial Relations) by refusing to process  
his grievance in accordance with the  
grievance and arbitration procedure  
provided in the collective agreement.

The Board found that the union had been  
negligent in accepting the employer's  
version concerning the timeliness of the  
grievance without verifying the relevant  
facts with the employee. Furthermore, the  
union had not carried out any  
investigation before deciding that the case  
law on this matter should apply in this  
case.

The union had processed the  
complainant's grievance in a superficial  
and negligent fashion, thereby breaching  
its duty of fair representation.



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Reasons for decision

Robert Emard,  
*complainant,*  
  
*and*  
  
Canadian Brotherhood  
of Railway, Transport  
and General Workers,  
  
*respondent,*  
  
*and*  
  
Canadian National,  
  
*employer.*

Board File: 745-3501

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The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Evelyn Bourassa and Ms. Ginette Gosselin, Members.

Appearances:

Mr. Robert Emard, complainant, on his own behalf;  
Mr. T.N. Stol, National Vice-President, accompanied by Mr. Gaston Côté, union representative, for the Canadian Brotherhood of Railway, Transport and General Workers; and Mr. Raynald Lecavalier, accompanied by Mr. Robert Faucher, labour relations officer, for Canadian National.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The proceeding

On December 28, 1989, the Board received a complaint from Robert Emard (the complainant) alleging violation of section 37 of the Code by the Canadian Brotherhood of Railway, Transport and General Workers (the union).

Section 37 reads as follows:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

The complainant claims that the union breached its duty of fair representation when it refused to submit at all the steps of the grievance procedure the grievance filed on his behalf on October 6, 1989 by Gaston Côté, accredited regional representative of the union.

The senior labour relations officer completed the investigation into the matter in January 1991. The Board heard the parties at a public hearing on May 31, 1991.

## II

### The facts

The facts that gave rise to the complaint can be summarized as follows.

On September 7, 1989, the complainant was summoned by Canadian National (the employer) to an interview for the purpose of investigating an incident that occurred while he was at work on August 29, 1989. This incident is described as follows: "refusing to work in signal bungalow 'B' in the presence of a Company officer who was doing a survey of the operation of those bungalows" (translation). This investigation was conducted on September 13, 1989. It ended before it was completed, and the complainant did not receive a copy of the findings, as required by the collective agreement. Following this investigation, the complainant received a notice of discipline (form CN 780), dated September 21, 1989, informing him that he was being assessed

10 demerit points and docked five hours pay for August 29, 1989. This notice was given to the complainant on September 25, 1989.

The same day, the complainant contacted Gaston Côté to inform him of the receipt of the document and of its contents. He then told him of the unusual procedure followed by the employer. The September 13 investigation had not in fact been completed and, under the applicable rules, disciplinary action could not be taken until the investigation was duly completed. Mr. Côté asked the complainant to send him a copy of form CN 780 and the relevant documents.

On October 3, 1989, the secretary of the local grievance committee, Guy Verdi, sent Mr. Côté a letter explaining the situation, and also informing him that the investigation had not been completed and that the complainant had not been given a copy of the investigation's findings. The letter also set out the reasons why a grievance should be filed. Mr. Côté received this letter on October 5. In the meantime, on the same date, October 3, 1989, the complainant received a copy of the investigation report and telephoned Mr. Côté to inform him. According to the complainant, Mr. Côté asked him to send him this document. Mr. Verdi then wrote another letter, dated October 5, which Mr. Côté received on October 10, 1989.

Mr. Emard clearly stated that he contacted Mr. Côté as soon as he received form CN 780 on September 25, 1989. As chairperson of the local grievance committee, he was well aware of the procedure to follow, and since there had been friction between him and his superior in the past, he immediately took steps to protect his rights because the manner in which the disciplinary action was taken was

contrary to the practices followed by the employer. Mr. Emard was equally clear concerning the conversation of October 3, 1989. He repeatedly asked the employer for a copy of this document, and when he finally received it on October 3, he was certain he notified Mr. Côté immediately because, in his opinion, this investigation report contained major inaccuracies.

Gaston Côté gave a different version of the facts. His first telephone contact with the complainant was on October 5, 1989, the same day he received the letter asking him to file a grievance. Attached to this letter were certain documents, including form CN 780. After examining these documents, he concluded that the time limit for filing a grievance had expired the previous day, October 4. He then contacted the employer to obtain an extension of the time limit. Despite the employer's negative reply, based on the fact that this type of request is denied where the time limit has already expired, he decided to submit a grievance directly at the second step on October 6. On October 5, or possibly October 6, he informed the complainant by telephone of the difficulties he had encountered regarding the time limit.

During this conversation, he also asked the complainant to send him a copy of the investigation's findings as soon as he received them. Mr. Côté received this document on October 10. He stated that he did not recall having spoken with the complainant about his grievance between October 10 and 30, the date of receipt of the employer's reply dismissing the grievance. Nor did he contact Mr. Emard at the time, and on October 31, he informed the complainant in writing that the union - in this case the regional vice-president and himself - had decided not to submit his grievance at the subsequent steps. The complainant appealed

this decision according to the procedure contained in the union's constitution. His appeal was rejected on March 23, 1990.

Mr. Côté denied having spoken with Mr. Emard on the telephone on September 25 and October 3. In support of this denial, he referred to his weekly activity reports in which he records all telephone conversations with the presidents or representatives of the locals for which he is responsible. He used the information obtained during these conversations to complete his activity reports and his expense accounts. These reports showed that during the weeks of September 24 and October 2, he had only one conversation with Mr. Emard, on October 5.

The question of the timeliness of the grievance is central to this complaint. The facts are as follows. Form CN 780, which consists of two detachable parts, is completed by the employer when disciplinary action is taken and the date is then recorded on the top part. The date recorded in this case was September 21, 1989. This form is then presented to the employee who signs the bottom part, as proof that he has in fact received it. The complainant signed the form on September 25, 1989. Once the form is signed, the employer gives the employee a copy of the top part only, on which only the date recorded by the employer appears. This procedure, which is not new, was confirmed by the employer representative, Robert Faucher. Messrs. Côté and Stol, for their part, while reluctant to admit the existence of this practice, did not however deny it.

The request to file a grievance, received by Mr. Côté on October 5, was accompanied by the top part of form CN 780, that is, the part received by the complainant. Since this was the only information he had, Mr. Côté used this date as

the starting point to calculate the prescribed 14-day time limit for filing a grievance and, hence, according to him, this time limit expired on October 4. However, in a letter to the Board of March 23, 1990, T.N. Stol, national vice-president of the union, stated that Mr. Côté received the documentation sent by Mr. Emard on October 6, not on October 5. He also makes clear in the letter that, in the union's opinion, the time limit for filing the grievance had expired on October 5, 1989 (and not on October 4 as Mr. Côté claimed at the hearing) and that the grievance was therefore already untimely when Mr. Côté received the complainant's request.

### III

#### Decision

The Board must decide whether the union, in refusing to submit Mr. Emard's grievance at the subsequent steps in accordance with the grievance procedure provided for in the collective agreement, including at arbitration, acted in bad faith, arbitrarily or negligently, contrary to the criteria that apply to the duty of fair representation.

The conflicting evidence concerning important facts, i.e. whether or not there were telephone conversations on September 25 and October 3, and the statements by union representatives concerning the timeliness of the grievance, obliged the Board to consider the credibility of the witnesses. An examination of the testimony and the written submissions on file has satisfied the Board that Mr. Emard's version is the one it must accept. He not only gave clear testimony concerning the attitude he adopted in his dealings with his union over his grievance, but also presented persuasive arguments in support of his attitude. As local

president and chairperson of the grievance committee, he was well aware of the procedure. Since he was directly involved, he asked the accredited representative to handle the matter and proceed to step two of the grievance procedure. Given the unusual nature, at least on the surface, of the procedure followed in taking this disciplinary action, it would be surprising if the complainant simply asked the secretary of the grievance committee to write a letter to Mr. Côté and to enclose relevant documents with it, without first explaining his situation to Mr. Côté.

Mr. Côté's version is less clear. In fact, he stated, solely on the strength of his weekly activity reports, that he had not spoken with Mr. Emard until October 5. His reference to these reports, to support his version concerning the telephone calls, points up the conflicting versions given by the union representatives regarding the date of receipt of the letter of October 3. According to Mr. Stol, the time limit expired on October 5, 1989, but since Mr. Côté received Mr. Verdi's letter on October 6, he could not be faulted since the documents in question were received after the expiry of the time limit provided for in the collective agreement. However, Mr. Côté stated that he received these documents on October 5 and now claims that the time limit for filing the grievance expired on October 4. This is a crucial contradiction in assessing not only the credibility of the witnesses, but also the conduct of the union in general in processing this grievance. Moreover, Mr. Côté's claim that both parts of form CN 780 were normally given to the employee further undermines his credibility. The Board therefore accepts Mr. Emard's version that there were telephone conversations on September 25 and October 3.

The Board is satisfied that the union conducted no investigation into Mr. Emard's grievance before deciding on October 31 not to proceed further with it. The manner in which the union processed this grievance is wholly superficial and constitutes a breach of the duty of fair representation.

The particular circumstances that attended the taking of this disciplinary action should have led the experienced union officials involved here to examine this matter more closely. As for the apparent disagreement over the date on which the complainant was informed that disciplinary action was being taken against him, which gave rise to the controversy over the calculation of the time limit for filing the grievance, the Board believes that the union was negligent in accepting automatically the version of this matter given by the employer to Mr. Côté on October 5, without checking at all with the employee.

Moreover, Mr. Côté's statement that he would not in any case have submitted Mr. Emard's grievance at the subsequent steps, given the nature of the matter and past experience with cases of this kind, is surprising in the circumstances of this case. Although it is not the Board's responsibility to consider the manner in which a union assesses the merits of a grievance or to determine whether the grievance has merit, it feels obliged in this case to point out that there is no rational basis for such a statement because no investigation of the facts and circumstances relating to the events of August 29, 1989 was conducted by the union, which did not consult the complainant or anyone else. (See in this regard Ronald Guy (1984), 59 di 132 (CLRB no. 494).) Moreover, in Thomas Zuk and Gloria Linfield (1985), 62 di 167; and 85 CLLC 16,060 (CLRB no. 531), the Board declared arbitrary and contrary to the Code the decision by a union not to proceed with grievances where the decision is made

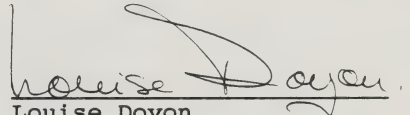
without an investigation and is justified on the basis of past arbitral awards without verifying the facts of each specific case. This statement of principle applies in the instant case.

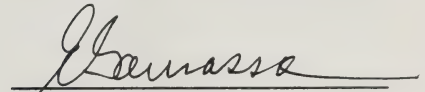
For all these reasons, the complaint is allowed.

The Board waives the times limits that apply to the arbitration and grievance procedure and orders the union to refer Mr. Emard's grievance to arbitration.

The Board also orders the union to pay any compensation that Mr. Emard might be awarded at arbitration.

This is a unanimous decision.

  
Louise Doyon  
Vice-Chair

  
Evelyn Bourassa  
Member

  
Ginette Gosselin  
Member

ISSUED at Ottawa, this 25th day of July 1991.



# information

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## SUMMARY

ROSEMOND LAMOUREUX,  
COMPLAINANT, CANADIAN AIR  
LINE PILOTS ASSOCIATION,  
RESPONDENT UNION, AND  
CANADIAN AIRLINES  
INTERNATIONAL LTD.,  
MIS-EN-CAUSE EMPLOYER.

Board File: 745-3097

Decision No.: 884

Canada Labour Code, Part I -  
Industrial Relations).  
Union's duty of fair  
representation. Section 37.  
Unfair labour practice  
complaint. Section 97.  
Dismissed. Excessive witness  
fees. Section 118.

Grievance by airline pilot  
(first officer) failing to  
upgrade to Captain. Union  
deciding not to go to  
arbitration.

## RESUME

ROSEMOND LAMOUREUX,  
PLAIGNANT, L'ASSOCIATION  
CANADIENNE DES PILOTES DE  
LIGNES AÉRIENNES, INTIMÉE, ET  
LES LIGNES AÉRIENNES  
CANADIEN INTERNATIONAL LTÉE,  
EMPLOYEUR MIS EN CAUSE.

Dossier du Conseil: 745-3097

Décision n°: 884

Code canadien du travail  
(Partie I - Relations du  
travail). Devoir de  
représentation juste du  
syndicat. Article 37.  
Plainte de pratique déloyale  
de travail. Article 97.  
Plainte rejetée. Indemnités  
des témoins excessives.  
Article 118.

L'affaire porte sur le grief  
d'un pilote (copilote) qui  
n'a pas réussi à obtenir le  
grade de commandant. Le  
syndicat a décidé de ne pas  
renvoyer le grief à  
l'arbitrage.

.../2



### On the Merits

A second officer on a Boeing 737 failed a simulator ride to upgrade to Captain. Following his test ride, the complainant consulted the employer's medical officer who referred him to a specialist. In the meantime, he was terminated by Flight Operations without consultation of the medical officer. A grievance was filed. Following its investigation, the union considered the issue to be solely one of competency and that the grievance would be lost at arbitration. They suggested the complainant accept a settlement which the complainant declined.

The Board reviewed the union's handling of the file (Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 R.C.S. 509). No evidence of bad faith nor of discrimination. Complaint dismissed.

### On the Witness Fees

The employer denied the complainant's counsel access to his client's medical file and personnel records, and requested from the complainant conduct money over \$2,000 (including air fare) to allow him to take the file from Vancouver to the Board hearing in Montréal.

After reviewing section 118, the Board found that some witnesses should reimburse part of the conduct monies they were paid.

### Bien-fondé

Un copilote de Boeing 737 n'a pas réussi le test de simulateur de vol prévu pour devenir commandant. Après le test, le plaignant a consulté le médecin de la compagnie qui l'a dirigé vers un spécialiste. Entre-temps, le service des opérations aériennes l'a congédié sans consulter le médecin. Un grief a été présenté. A la suite d'une enquête, le syndicat a jugé qu'il s'agissait d'une affaire de compétence et qu'il n'aurait pas gain de cause à l'arbitrage. Il a proposé au plaignant d'accepter un règlement que celui-ci a refusé.

Le Conseil a examiné la façon dont le syndicat avait traité le dossier (Guilde de la marine marchande du Canada c. Guy Gagnon et autre, [1984] 1 R.C.S. 509). Aucune preuve de mauvaise foi ou de discrimination n'a été établie. La plainte a été rejetée.

### Indemnités des témoins

L'employeur a refusé à l'avocat du plaignant l'accès aux dossiers personnel et médical de son client et a demandé au plaignant des frais de déplacement de l'ordre de 2 000 \$ (y compris le billet d'avion) pour lui permettre de faire parvenir un dossier de Vancouver à Montréal, où avait lieu l'audience du Conseil.

Après avoir examiné l'article 118, le Conseil a jugé que certains témoins devaient rembourser une partie des frais qu'ils avaient reçus.

Reasons for decision

Rosemond Lamoureux,  
*complainant*,  
Canadian Air Line  
Pilots Association,  
*respondent union*,  
*and*  
Canadian Airlines  
International Ltd.,  
*mis-en-cause employer*.  
Board File: 745-3097

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The Board was composed of Mr. Serge Brault, Vice-Chairman,  
and Messrs. Calvin B. Davis and Robert Cadieux, Members.

Appearances:

Mr. Melville W. Smith, assisted by Mr. Claude Bourbonnais  
and Mr. Rosemond Lamoureux, for the complainant;  
Mr. John T. Keenan and Ms. Lila Stermer, assisted by  
Mr. Kevin Healy, for the Canadian Air Line Pilots  
Association; and  
Mr. G.J. Heywood, assisted by Mr. R.G. Winter, Director  
of Labour Relations, for Canadian Airlines International  
Ltd.

These reasons for decision were written by Mr. Serge  
Brault, Vice-Chairman.

I

The Proceedings

This decision deals with the merits of a complaint filed  
by Mr. Rosemond Lamoureux (the complainant) against the  
Canadian Air Line Pilots Association (CALPA or the union)  
pursuant to section 37 of the Canada Labour Code

(Part I - Industrial Relations) pertaining to the union's duty of fair representation:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

Up until his dismissal on April 8, 1988, the complainant was a first officer on a Boeing 737 aircraft for Canadian Airlines International Limited (Canadian or the employer). It was CALPA's decision not to defer to arbitration the grievance filed following Mr. Lamoureux's dismissal that led to this complaint.

These events were the object of an earlier decision by the Board, Rosemond Lamoureux (1990), as yet unreported CLRB decision no. 831, which dealt only with the timeliness of the complaint.

The hearing into the merits of this case took place on March 11-15, and on May 30, 1991 in Montréal, Quebec.

## II

### The Evidence

Nine witnesses were called by the complainant. Apart from the complainant himself and his wife who assisted him throughout (see Rosemond Lamoureux, supra), the Board heard Mr. Robert Winter, Director of Labour Relations for Canadian, Dr. W.G. Hartzell, pilot and former Director of Medical Services of Canadian in Vancouver, Dr. Peter Roper, psychiatrist and consultant to CALPA, as well as

Dr. Robert Perlman, a Montréal physician affiliated with Canadian. Also testifying were Captain J.T. Partikian, a pilot with Canadian, Captain J.R. Beauvais, a colleague of the complainant also involved in CALPA, Mr. Louis Gyarmathy, pilot and former CALPA official who handled Mr. Lamoureux's grievance throughout the grievance procedure, and Mr. Kevin Healy, who chaired the Master Executive Council of CALPA for the Nordair Pilot Group from which originated Mr. Lamoureux. Finally, Mr. Jocelyn Bourgeau, a regional officer for Transport Canada, testified on government regulations pertaining to the licensing of pilots. Since CALPA had had ample opportunity to introduce their case in the cross-examination of the witnesses called by the complainant, they did not call any evidence of their own.

The Master Executive Council (MEC) is the body within CALPA which is empowered to defer grievances to arbitration. It had decided not to do so in Mr. Lamoureux's case, which eventually led him to file a complaint under section 37.

Even though a section 37 complaint requires that the Board look into the processing of a grievance by a union rather than into the merits of such a grievance, a thorough assessment of the factual background of the union decision often entails a somewhat close look at the facts that led to the grievance in the first place. Such was the case here.

Mr. Lamoureux's career started with Nordair, a regional carrier based in Quebec which was purchased by Canadian Pacific Airlines which in turn, through a series of transactions, has come to be known as Canadian Airlines

International. At all times relevant to this complaint, the complainant's terms and conditions of employment were governed by the ex-Nordair pilots' collective agreement.

As mentioned, the complainant was a first officer on board a Boeing 737 aircraft for well over 10 years. His base was Montréal. In January 1988, Mr. Lamoureux's bid for captaincy on a Boeing 737 was awarded by the employer. A standard feature of this kind of promotion is that a successful flight simulator test be made under the supervision of the company's check pilots as well as Transport Canada. Mr. Lamoureux failed that test in March 1988. Under the Nordair collective agreement, the employer has the right to terminate a pilot who fails twice an attempt to upgrade to captaincy.

Although he expressed some reservations about that fact, the overwhelming evidence adduced establishes that prior to 1988, Mr. Lamoureux had once failed a captain potential assessment to upgrade to captain on a Boeing 737.

In simple terms this meant that when Mr. Lamoureux's bid for captaincy was awarded by the employer in 1988, he absolutely needed to pass the flight simulator test since a failure exposed him to dismissal even as a first officer.

From the outset, the complainant was very concerned about his flight simulator test that was to take place in Vancouver. Before the test, he sought and obtained assistance from Captain Partikian, his local CALPA representative.

During the week prior to the test, in accordance with standard company policy, Mr. Lamoureux underwent training in the company simulator in Vancouver. During that week, Mr. Lamoureux started experiencing cold symptoms. On the day prior to the test, he went to Dr. Hartzell who, at the time, was the company chief medical officer, to complain of a minor cold. He took Sudafed pills to improve his condition. He was advised that in the circumstances only he could assess and decide whether or not his condition allowed him to take the test the next day. The complainant decided that he would. On March 15, Mr. Lamoureux took and failed the flight simulator test. Right after the test, he met a CALPA representative who gave him support.

After his return to Montréal, Mr. Lamoureux became depressed and consulted Dr. Robert Perlman who was the company's physician in Montréal.

According to Dr. Perlman, Mr. Lamoureux "appeared to be heading towards a reactive depression and was asked to stay off the line" (document 31). Dr. Perlman reported his prognosis to Dr. Hartzell in Vancouver who in turn decided to ask Mr. Lamoureux to come to Vancouver to enable him to assess whether the complainant's condition had anything to do with his failed flight simulator test. In addition Dr. Hartzell hoped to determine what kind of therapeutic intervention would be appropriate to help Mr. Lamoureux deal with the distress that he "had been feeling since the simulator ride" (document 24C). An appointment was set for April 8 in Vancouver, and arrangements were made for Mrs. Lamoureux to accompany her husband. In the meantime, Flight Operations, while aware of Mr. Lamoureux's visit to Vancouver, were not apprised

of the Medical Services' intentions concerning Mr. Lamoureux.

Following his meeting with the complainant and his wife, Dr. Hartzell immediately arranged for an appointment with a psychiatrist from Vancouver, Dr. R.O. Robinow. While Dr. Hartzell wrote to Dr. Robinow that Mr. Lamoureux did not appear to have "classical signs of depression," he nonetheless required assistance from Dr. Robinow on the following questions (document 24B):

- "i) Do you feel that there was any pre-existing medical condition which influenced Ross' latest failure in the simulator.*
- ii) What could best be done to return Ross to a comfort level if his present condition is secondary to his failure or return him to a condition where he might be fit for another attempt to upgrade if you feel his failure was secondary."*

That letter was not disclosed to Mr. Lamoureux nor to CALPA before the Board's hearings into this case.

The same day Dr. Hartzell met the Lamoureux couple and made his arrangements with Dr. Robinow, the complainant was invited along with Captain Kevin Healy from CALPA to meet Canadian's Director of Flight Training, Captain Gilliland, to discuss Mr. Lamoureux's unsuccessful test.

At the end of their meeting, a termination letter was immediately handed over to Mr. Lamoureux stating that given Mr. Lamoureux's "failure on three occasions to attain competency as a Captain, the company [had] decided pursuant to Article 8 and LOU #11, to terminate [his] employment status effective immediately" (document 1(10), April 8, 1988). Needless to say that Mr. Lamoureux was

in shock. Dr. Hartzell later commented to Mr. Lamoureux (document 24C) that he felt the same:

*"I was genuinely shocked when I found out about your meeting with Captain Gilliland and the result of that meeting. I had not communicated to Captain Gilliland anything about your fitness and his actions made my attempt to do a medical assessment somewhat redundant. I have since communicated this quite clearly to him. I am not suggesting that he managed this improperly as that is not for me to judge. I do regret that there was a lack of communication.*

...

*I know that this will not help with any of the problems you are currently facing. I felt that I needed to tell you that my motives in dealing with you were open and honest and that I was not involved or consulted in any way regarding the actions which were subsequently taken."*

The complainant and his wife immediately came back to Montréal without going to Dr. Robinow as agreed, and sought CALPA's help. On April 14, 1988, Captain Healy, on behalf of CALPA, visited Canadian's office in Vancouver and requested Mr. Lamoureux's entire file. He was given copies of what the company considered to be relevant to the issue of Mr. Lamoureux's dismissal.

Captain Gyarmathy, then grievance chairman for CALPA, agreed at Mr. Lamoureux's request to handle his grievance personally. They all met with CALPA's attorney and reviewed the file extensively. Lengthy discussions were held between the Lamoureux couple and CALPA's officials during the month of April. Parallel to that, the MEC's chairman also sought the opinion of CALPA's attorneys to assess "the correctness of the Company's action in terminating F/O R. Lamoureux [sic] and also comments as to the chances of success in setting aside the termination and, if so, on what grounds" (document 26B, page 3). A grievance was actually filed on April 29, 1988.

CALPA's counsel submitted an opinion to MEC's chairman the same day the grievance was filed. In her opinion, counsel Stermer canvassed the three grounds raised by Mr. Lamoureux for contesting the discharge. These can be summarized as follows: he was terminated while under medical care; he felt he had been harassed and discriminated against by the company since early on in his career; and he believed that the failures the company was relying on were not valid since he felt he had never passed a second captain potential assessment after the initial failure.

In her review of the facts, the attorney examined the possibility that Mr. Lamoureux might have been ill during the simulator ride. She also advised that a thorough review of the technical file of Mr. Lamoureux be made as well as an assessment of its impact.

The contents of Mr. Lamoureux's file turned out to be a central issue in this complaint. CALPA sought Mr. Lamoureux's complete files from management on numerous occasions prior to and after different grievance meetings. CALPA even filed a grievance to secure Mr. Lamoureux's entire employment record.

In the end, CALPA was satisfied that Mr. Lamoureux's technical background had been thoroughly investigated.

At some point in its assessment of the impact of the April 8th failure, CALPA concluded that the failure to upgrade also had the practical effect of depriving Mr. Lamoureux of his instrument rating required under government regulation and thereby of his competency to

even work as a first officer. This led CALPA's counsel to conclude in a later opinion to CALPA's MEC that, this being the case, an arbitrator could not even consider that Mr. Lamoureux could have at least been kept on as a first officer. This led the attorney to suggest that the grievance was a sure loser.

At that point, Mr. Gyarmathy was in charge of Mr. Lamoureux's file within the MEC, and he continued to push on Mr. Lamoureux's case with management and within CALPA. He strongly argued the case at steps one and two of the grievance procedure even though at that point CALPA believed that Mr. Lamoureux's grievance would be lost at arbitration.

At some point in CALPA's talks with management, they were told that the company was willing to offer Mr. Lamoureux a job in an alternate position in addition to the monetary settlement that had already been put to him. Given CALPA's assessment of the grievance's chances, Mr. Gyarmathy sought Mr. Lamoureux's consent in order to engage in settlement negotiations with management. The Lamoureux couple squarely refused any settlement and insisted that the grievance be processed to the end. They raised the possibility of resorting to outside counsel, a suggestion Mr. Gyarmathy discouraged as likely to offend some in CALPA. The position of Mr. Lamoureux that they would not settle for anything less than total victory remained throughout, even after the second and final hearing of the grievance procedure which took place on August 11, 1988. The company's own position always was that Mr. Lamoureux had indeed failed a captain's assessment as well as two captain upgrade attempts and

that their decision to terminate him was indeed allowed under the collective agreement.

For his part, Mr. Lamoureux insisted that his employment record provided to CALPA was incomplete and he insisted that the union secure a complete file. At some point, Captain Gililland had denied CALPA a request for further documents on the following grounds:

*"Since we [the company] cannot ascertain which documents from F/O Lamoureux's personal and training files you have in your possession at this time, you are free to peruse both files and copy any documents you are missing."*

(document 26B, page 24)

As it turned out, the entire file was eventually made available at the Board's hearings.

The MEC met in Toronto on September 15, 1988 to decide whether to defer Mr. Lamoureux's grievance to arbitration. Mr. Gyarmathy, who had handled Mr. Lamoureux's case from the start, was expected to report to the MEC. He was not able to attend since the company had denied him the time off to do so.

He was nonetheless able to take part in the MEC meeting through a phone conference where he thoroughly reported his understanding of Mr. Lamoureux's situation. Following Mr. Gyarmathy's report, the MEC's majority position was that the matter should not be brought to arbitration on the grounds that it lacked "sufficient merit to proceed to arbitration" (document 26B, page 27). This was eventually the MEC's unanimous decision.

Mr. Lamoureux was informed over the phone of the MEC's decision and he asked that it be put in writing (see Rosemond Lamoureux, supra). That was done on September 19, 1988. Later, in a letter to Mr. Lamoureux's counsel dated December 14, 1988, CALPA's attorney basically reiterated their reasons to deny arbitration and added that "the Association had advised Mr. Lamoureux to accept the Company's offer of settlement" (document 26B, page 35). That fact is not challenged.

Finally, the Board heard evidence from Dr. Peter Roper, a psychiatrist who has long been a CALPA consultant and who was seen by Mr. Lamoureux, at CALPA's suggestion, for his depression (see Rosemond Lamoureux, supra). Dr. Roper also testified, this time as an expert, on the possible side-effects of the medication - Sudafed - on a pilot's ability to take a test ride. Dr. Roper filed an article he had signed some years before in CALPA's newsletter where he explained how such medication could indeed impair one's ability to fly. In cross-examination, Dr. Roper recognized that his evidence was not to the effect that Mr. Lamoureux was indeed impaired when he underwent his test ride.

In that regard, other CALPA witnesses established that the suggestion made by Dr. Roper was never brought to their attention before CALPA made its decision.

Also on record is a complaint filed by Mr. Lamoureux against his employer before a human rights commission where he alleges that he was fired because of discrimination on the grounds of his mental condition.

III

The Parties' Submissions

Essentially, counsel for the complainant and for the union relied on the test set out by the Supreme Court in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 R.C.S. 509, in order to assess a union's compliance with its statutory duty of fair representation.

For the Complainant

According to counsel for the complainant, while recognizing that Mr. Lamoureux had no absolute right to arbitration, he contends that the union's decision not to go to arbitration was not made in good faith, was unfair and did not result from a genuine consideration of the issues at stake. Counsel further argued that CALPA's handling of the case was tainted with hostility.

In support of its allegation of violation of section 37, counsel first pointed out that CALPA had failed to obtain Mr. Lamoureux's complete employment and medical records. He insisted that the letter Dr. Hartzell wrote to Dr. Robinow on April 8, 1988 had never been provided to the union and that it established that there had been a commitment by the company to have Mr. Lamoureux medically assessed before any determination would be made on this case. According to counsel, CALPA's failure to secure that letter was proof of their negligence in handling the grievance.

A second failure of CALPA would be in the way the MEC made their decision. In counsel's view, the fact that Mr. Gyarmathy was not present when the crucial decision

was made violates section 37. So would the fact that the MEC relied on what is characterized as a mere preliminary legal opinion of CALPA, which dated back four months before the actual decision of the MEC, an opinion which was never disclosed to the complainant.

Furthermore, the failure to postpone the MEC meeting when they realized that Mr. Gyarmathy could not attend was tantamount to negligence. In counsel's view, Mr. Gyarmathy's absence, even though he took part in the meeting via a phone conference, is evidence of how hastily CALPA handled the matter. Counsel also qualified as bad faith the fact that the opinion of counsel for CALPA submitted to the MEC Chairman was not disclosed to his client. In counsel's view, Mr. Lamoureux was entitled to know what was going on "in his lawyer's mind."

Also relied upon is the fact that CALPA did not apparently consider significant that Canadian's Director of Flight Training dismissed Mr. Lamoureux precisely when the company's medical director was about to proceed to further consultation on Mr. Lamoureux's condition.

Another point raised by counsel is CALPA's allegation that Mr. Lamoureux had lost his license when he failed the flight simulator test. According to Transport Canada regulations, a license could never be suspended without giving prior notice to the interested individual. In counsel's view, since Mr. Lamoureux had never been notified of any such suspension, it was grossly wrong for CALPA's counsel to have characterized his failure as having the practical consequence of depriving him of his first officer license.

Relying on Dr. Roper's evidence, counsel argued that CALPA should have investigated further the side-effects of the cold medication Mr. Lamoureux took when he failed the test. In counsel's view, this is tantamount to gross negligence on the part of CALPA.

Counsel further argued that the decision to abandon the grievance at that point, thereby taking any pressure off the employer, had deprived the complainant of all his rights and was tantamount to hostility. In the same vein, counsel recalled Mr. Gyarmathy's comments against the complainant's suggestion of retaining his own counsel. Relying on Kenneth Cameron (1980), 42 di 193; and [1981] 1 Can LRBR 273 (CLRB no. 282), the complainant finally argued that had CALPA seriously researched the issue and investigated his case, they could have found other means of challenging the employer's decision. In summary, for Mr. Lamoureux's counsel, the dismissal was obviously not a competency case and CALPA's failure to realize that violated section 37.

#### For CALPA

Counsel for the union challenged each and every allegation made against his client. Counsel recited the different means deployed in favour of the complainant. He insisted that hundreds of hours had been spent in trying to achieve a satisfactory result in the course of the grievance procedure and that all facts of the case were investigated and assessed in a fair, professional and unbiased fashion.

Without recognizing any wrong on the part of the union or its officials, counsel reviewed the case law on the application of section 37. Counsel submitted that section

37 recognized that a union could be wrong and still not violate the Code as long as it acted in good faith, and with reasonable care, given its resources.

Insofar as the employer is concerned, its counsel did not intervene on the merits of Mr. Lamoureux's complaint since he was not in attendance on May 30th.

#### IV

#### Analysis

The Supreme Court outlined the principles governing the duty of unions to fairly represent their constituents in Canadian Merchant Service Guild v. Guy Gagnon et al., supra:

*"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*

*1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

*2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

*3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

*4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

*5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(page 527)

The Board has thoroughly reviewed the facts of the complaint as well as some of the facts that led to Mr. Lamoureux's dismissal.

Mr. Lamoureux's unsuccessful test ride of March 19, 1988 is not contested. The record shows that subject to certain conditions, the collective agreement provides that such a failure could indeed lead to a dismissal.

Generally, after having considered all the evidence, the Board cannot view CALPA's characterization of Mr. Lamoureux's dismissal as being tainted with bad faith or otherwise contrary to section 37 of the Code.

Counsel for the complainant strongly questioned CALPA's interpretation of the existence, as well as their effects, of the past failures experienced by Mr. Lamoureux. He argued that Mr. Lamoureux's license was not automatically nor materially cancelled after the 1988 failure, and that it naturally expired at the end of 1988. The Board is not empowered to decide that. What we need to assess is the union's belief. The Board does not find that the evidence heard from Transport Canada supports the view of counsel for the complainant. It rather points in the direction that that license could at least be cancelled and that it would indeed have been cancelled when it came up for renewal later that year, had renewal been sought. That would not have resulted from the dismissal but rather from the failure. That interpretation also appears to be

consistent with the fact that the collective agreement allowed dismissal in the case of failure to upgrade to captain.

The evidence shows that Canadian indeed resisted handing out CALPA the entire employment or medical records of Mr. Lamoureux. CALPA cannot be blamed for that. The obvious explanation of management's resistance lies in Dr. Hartzell's letter to Dr. Robinow dated the day Mr. Lamoureux was dismissed by Mr. Gilliland. To quote Dr. Hartzell, this evidences a serious failure in "communications." That failure was likely present in their mind when they rejected CALPA's request to see the entire files. (In our view, it was also in the employer's mind when they also denied access to Mr. Lamoureux's counsel in these proceedings and requested a subpoena and conduct money prior to filing them. We will turn to this incident later on in these reasons.)

This being said, we do not see how that document, had it been known earlier, could have materially affected the legality, as well as the validity of CALPA's decision concerning the likely outcome of Mr. Lamoureux's grievance at arbitration. It is one thing to make management look bad, but it is another to say that an arbitrator would have quashed Mr. Lamoureux's dismissal on the basis of Dr. Hartzell's comments. We have to read the document as a whole and consider that in his letter, Dr. Hartzell, who had seen Mr. Lamoureux on the eve of the test, explained to Dr. Robinow that Mr. Lamoureux's ability to take the test was not, in his view, affected at the time he took it.

The Board thoroughly reviewed Mr. Gyarmathy's handling of the grievance before management, as well as before the MEC. The Board is convinced that Mr. Gyarmathy's handling of the grievance at all levels was without reproach. All documents filed show that the case was thoroughly researched before each grievance meeting. In the end, the union had serious grounds to characterize the problem as one of competency. They chose to try to break management on the ground that Nordair had kept poor personnel records in the past. They would try to argue that Mr. Lamoureux's past failures were not clearly documented. Yet they knew from their investigation that regardless of the poor quality of the old files, the facts were solidly in favour of management.

The fact that Mr. Gyarmathy did not attend the MEC meeting does not in our view affect the validity of the process followed by the union. In a union of the size of CALPA with members throughout Canada, it is common and normal to resort to phone conferences. The evidence shows that the meeting examined a complete file, and that Mr. Gyarmathy thoroughly reported his findings and views for the benefit of everyone present. We are convinced that it will not escape the complainant that it is somewhat contradictory to argue that Mr. Gyarmathy had not done a good job in his investigation and yet submit that the MEC would not have dropped the issue had Mr. Gyarmathy submitted his report in person. Be that as it may, Mr. Gyarmathy's views were duly weighed and discussed with him by the assembly, and a difficult decision was made after lengthy discussions, with no hostility nor negligence towards Mr. Lamoureux. The Board stated in Jacqueline Brideau (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), that a union can be

found to have violated section 37 where its conduct is arbitrary or the result of a superficial or perfunctory consideration of the issues is at stake. Such was not the case here.

Often when arbitration is not viewed as a realistic option, an honourable settlement can still be sought. The duty of fair representation clearly requires that a union not ignore nor defeat the possible settlement options when it otherwise lawfully decides not to go to arbitration. For a union not to pursue a settlement offer without valid reasons when a realistic settlement may still be in the cards could surely be found in violation of section 37.

The uncontradicted evidence establishes that early on the union believed that Mr. Lamoureux should seek a settlement and offered to explore that avenue with management. Mr. Lamoureux denied the union any authority to look into that possibility and never changed his views. The union had no choice but to go to arbitration or to abandon the grievance. Their decision to drop the grievance was in fact the only option they had outside of going to arbitration.

In conclusion, the Board finds that the MEC's decision that Mr. Lamoureux's grievance would not be won at arbitration and should therefore be dropped was reached in good faith. It is never easy for a union to make such a determination given the very serious consequences for the employee concerned, not to mention the fact that such a decision might lead to a complaint like this one. Rendering such a decision difficult is precisely the purpose of section 37: to ensure that nothing is done

hastily, superficially and without due consideration. In a case such as this one, where after a thorough investigation, the union honestly concludes that the issue is one of competency, a balance obviously needed to be struck. Here CALPA had consistent arbitration awards showing the grievance would not succeed. That opinion was supported by an honest consideration of the issues and not tainted with bad faith. They decided not to go to arbitration. CALPA did not have to. The Code only requires that a union decide the issue fairly.

In conclusion, the Board finds that CALPA's decision was made within the discretion given to bargaining agents under the Code and in good faith. Mr. Lamoureux's complaint is accordingly dismissed.

V

Incidental Finding on Witness Fees

As mentioned earlier in these reasons (page 2), numerous witnesses were called by the complainant and sent by counsel for Mr. Lamoureux conduct monies totalling around \$8,000, for the cost of air travel and other fees and expenses. The amounts involved raised some concerns with the Board.

Canadian was added as a party to these proceedings by the Board at their very outset and Canadian co-operated in the Board's investigation.

Section 16(a) of the Code reads as follows:

*"16. The Board has, in relation to any proceeding before, it, power*

*(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Board deems requisite to the full investigation and consideration of any matter within its jurisdiction that is before the Board in the proceeding;..."*

Section 118 deals with witness fees and expenses.

*"118. A person who is summoned by the Board ... to attend as a witness in any proceeding taken under this Part, and who so attends, is entitled to be paid an allowance for expenses and a witness fee, determined in accordance with the scale for the time being in force with respect to witnesses in civil suits in the superior court of the province in which the proceeding is being taken."*

One of the witnesses sought by the complainant was Canadian's Director of Labour Relations. Also called was Dr. Hartzell who was Canadian's doctor at the time. Both were asked to bring and file Mr. Lamoureux's records before the Board.

In the case before us, the witness fees and expenses are governed by the rules applicable to civil suits in the province of Quebec where the hearing was held, as provided for in section 118 above.

As mentioned earlier, Mr. Lamoureux was under the impression from the very start that management had not provided his entire employment and medical records to the union during the grievance process. Later, Mr. Lamoureux's counsel, after CALPA's, tried unsuccessfully to secure assurances from management but was always denied access. A subpoena had eventually to be issued by the Board, clearly for the purpose of securing these documents which after all directly pertain

to the complainant. As it turned out, Mr. Lamoureux was right. We have already determined that this fact does not impact on the merits of this case. Yet it does otherwise.

Canadian's Director of Labour Relations was given \$2,000 conduct money for attending the Board's hearing in Montréal including monies to cover his air fare. Dr. Hartzell, who by then had left his employment with Canadian, charged the complainant and was paid for his own attendance \$4,624.02, including \$1,814.72 for an air fare on board Canadian.

When the subpoenas and proof of service were filed, after the first series of hearings, the Board on its motion decided to ask all counsel to address in argument the question of whether or not these witnesses were entitled under the Code to the fees and expenses they were paid by counsel for the complainant. All witnesses were notified of the Board's intentions and invited to comment if they so wished. The issue was addressed by counsel in their final argument.

The Regulation respecting indemnities payable to witnesses summoned before courts of justice, Code of Civil Procedure (R.S.Q., c. C-25, a. 321), determines the sums owed to witnesses in civil suits in the province of Quebec. Generally, a witness is entitled to an indemnity of \$20 per day of absence from work; a witness recognized and declared as an expert is entitled to \$40. The Regulation further provides that:

*"2.(2) ... On express request of an expert witness, and for exceptional reasons, the Attorney-General in the case of a Crown witness, and the court in other cases, may increase the indemnity of the said witness. Such increase is not taxable against the opposing party."*

(3) Such indemnity is not paid to witnesses who, pursuant to acts, orders in council, contracts, understandings or collective agreements, do not suffer a loss of wages as a result of their being summoned to appear as witnesses."

(emphasis added)

Some light can also be drawn from CALPA's current collective agreement with Canadian. That agreement provides for the following:

"25-6 PILOT WITNESSES/REPRESENTATIVES

... Such witnesses and representatives who are employees of the Company shall be provided with free space available transportation on Company aircraft to and from any hearing(s)."

...

28-4 WITNESSES

At any hearing(s) held throughout the grievance procedures, all witnesses and representatives who are employees of the Company shall be given time off and transportation as per Sub-Section 25-6 (PILOT WITNESSES/REPRESENTATIVES)"

Counsel for Canadian did not attend the hearing where this issue of conduct money was discussed. He rather filed written submissions which we reproduce in part (document 45):

"When Mr. Winter was first contacted about giving evidence at this hearing, I dealt with Mr. Smith and we agreed upon an appropriate amount of conduct money. Mr. Smith provided that sum and Mr. Winter was produced, along with the Company files. Had our intention been to be as difficult as possible, we would have required a separate subpoena and conduct fees for our Company doctor in order to accompany the medical files. Mr. Winter, in his capacity as a Labour Relations Officer, had no care or control over the medical files, just employee files.

Mr. Smith also took advantage of an opportunity at the hearing to question Mr. Winter about his expenses and whether he purchased a plane ticket. Mr. Winter responded that he had purchased a plane ticket and was incurring

*expenses at the hotel. Had the Board wanted to explore this issue in greater detail, that should have been done when the witnesses were there and could speak to this matter. If the witnesses expenses are being impugned, presumably the witnesses should be present to answer any allegations - but again, that would be at considerable expense.*

*In summary, while it may be an interesting endeavor to review the Board's practice regarding conduct money, we fail to see how such review is warranted in these proceedings. I spoke with Mr. Smith to arrange for an appropriate amount of conduct money and I confirmed with the Montreal office of the Canada Labour Relations Board that the rules of the Quebec Superior Court would govern.*

*For all of the above reasons we fail to see why the Board is embarking on this exercise and in any event, due to prior obligations neither Mr. Winter or myself is able to attend. All of which is respectfully submitted."*

(emphasis added)


Counsel for the complainant did not challenge the fact that he had voluntarily paid conduct money to all witnesses. He nonetheless clearly indicated that he had very little choice to proceed otherwise, at least to secure the documents he needed for his case.

Canadian's counsel recognized that the matter is and was to be governed by the rules applicable in the Quebec Superior Court. Having heard all the evidence, the Board sees no valid reason why Canadian refused Mr. Lamoureux's counsel access to the file, including any medical file that was in the custody of the employer. The least they could have done would have been to mail the file to one of their staff in Montréal. Moreover, the rules governing fees need to be applied in a way that makes sense. For Canadian to require that a witness be flown from Vancouver to Montréal in order to simply bring a document was not warranted in the circumstances of this case.

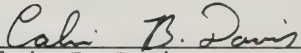
The Board is satisfied that the sums paid to Dr. Roper, Hartzell and Perlman were paid voluntarily to the extent that counsel for the complainant did not suggest otherwise. Without expressing any view on the matter, the Board will let it rest. Insofar as CALPA's representatives are concerned, the Board does not know whether these individuals actually "suffered a loss of wages as a result of having been summoned to appear as witnesses." Yet it seems they were compensated for lost wages. We can only suggest that they reimburse the monies they received if they did not suffer any loss. We appreciate that counsel for the complainant, for the most part, volunteered the conduct monies paid, yet the Board considers necessary in the circumstances to issue such a recommendation.

All counsel appearing before the Board must realize that there is no automatic, legal or policy entitlement to cost in favour of the "winning" side, in any proceeding before the Board. In fact, "reasonable cost" is exceptionally awarded, probably more often in section 37 cases than anywhere else. This being so, even where successful, one should be very careful not to incur costly expenses since, regardless of the outcome, these costs will rarely be borne by the other side. If for some reason a party experiences what it feels are unreasonable difficulties in preparing their case, they would be well advised to apprise the Board's officer assigned to the case of their problems and seek assistance. Such an approach is likely to lead to solutions more compatible with sound labour relations and with everyone's long-term best interest.

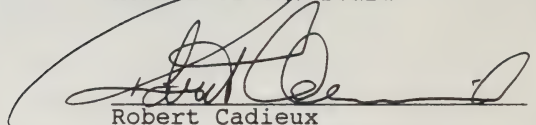
The Board is confident that Canadian and CALPA will make the necessary arrangements for any conduct money paid to their representatives to be reimbursed to counsel for the complainant within 15 days of this decision.



Serge Brault  
Vice-Chairman



Calvin B. Davis  
Member of the Board



Robert Cadieux  
Member of the Board

ISSUED at Ottawa, this 29th day of July 1991.

CLRB/CCRT - 884

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## Summary

GENERAL TRUCK DRIVERS AND HELPERS,  
TEAMSTERS LOCAL UNION 31 ON BEHALF OF  
MICHAEL BLOSKI, DWIGHT KASDORF AND  
GARY ZELLER, COMPLAINANTS, AND  
NORTHLAND BEVERAGES (1956) LTD.,  
RESPONDENT.

Board File: 745-3945

Decision No.: 885

## Résumé de Décision

SECTION LOCALE 31 DU SYNDICAT DES  
TEAMSTERS (GENERAL TRUCK DRIVERS AND  
HELPERS), AGISSANT AU NOM DE MICHAEL  
BLOSKI, DWIGHT KASDORF ET GARY ZELLER,  
PLAIGNANTS, ET NORTHLAND BEVERAGES  
(1956) LTD., INTIMÉ.

Dossier du Conseil: 745-3945

N° de Décision: 885

These reasons deal with a complaint  
under section 94(3)(a)(i) of the  
Canada Labour Code (Part I -  
Industrial Relations) wherein it was  
alleged that Northland Beverages  
(1956) Ltd. had terminated the  
employment of Michael Bloski, Dwight  
Kasdorf and Gary Zeller because they  
had exercised their right under the  
Code to be represented by the trade  
union of their choice for the purposes  
of engaging in collective bargaining.

The complaint was upheld. The  
employer was found to have violated  
the Code and the Board ordered that  
the three employees be reinstated in  
their employment and compensated for  
lost wages and benefits.

Les présents motifs traitent d'une  
plainte fondée sur le sous-alinéa  
94(3)(a)(i) du Code canadien du  
travail (Partie I - Relations du  
travail) dans laquelle il est allégué  
que Northland Beverages (1956) Ltd.  
a congédié Michael Bloski, Dwight  
Kasdorf et Gary Zeller parce qu'ils  
ont exercé le droit que leur confère  
le Code d'être représentés par le  
syndicat de leur choix aux fins de la  
négociation collective.

La plainte a été maintenue. Le  
Conseil a jugé que l'employeur avait  
enfreint le Code et il a ordonné que  
les trois employés soient réintégrés  
dans leurs fonctions et indemnisés  
pour le salaire et les avantages  
qu'ils avaient perdus.



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Reasons for decision

General Truck Drivers and  
Helpers, Teamsters Local  
Union 31, on behalf of  
Michael Bloski,  
Dwight Kasdorf, and  
Gary Zeller,

*complainants,*

and

Northland Beverages (1956)  
Ltd.,

*respondent.*

Board File: 745-3945

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The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair and Messrs. Calvin B. Davis and Robert Cadieux, Members.

Appearances:

Ms. Shona A. Moore for the complainants; and

Mr. C.H. Harrison for the respondent.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

This complaint of unfair labour practice against Northland Beverages (1956) Ltd. (the employer or Northland) was filed with the Board on May 30, 1991 by the General Truck Drivers and Helpers, Teamsters Local Union 31, (the union or the Teamsters). In the complaint the union alleges that the employer terminated the employment of Michael Bloski, Dwight Kasdorf and Gary Zeller because they had joined the union and an

application for certification had been filed with the Board for bargaining agent status for the union to represent employees of Northland.

The employer denied that it had fired Messrs. Bloski or Kasdorf for union activities and alleged that Gary Zeller had quit on his own accord. Efforts by a Board Officer to assist the parties to settle the matter being to no avail, the complaint was heard by the Board at Whitehorse on July 17 and 18, 1991.

## II

Northland is a soft drink distributor operating in the Yukon from its headquarters at Whitehorse. Michael Bloski had been employed in the employer's warehouse from May 1, 1990 until May 15, 1991 when he was fired. Dwight Kasdorf's employment as a highway driver/salesperson was also terminated on May 15, 1991 after he had worked for Northland from April 3, 1991. Gary Zeller, who had been employed as a swamper or driver's helper since November 11, 1990, was given his final paycheque on May 24, 1991. All three had joined the union on May 10, 1991 and the union had filed its application for certification with the Board on May 13, 1991.

At the hearing, the Board heard evidence on behalf of the employer to the effect that Michael Bloski had been given a job at Northland on a temporary basis when he moved to Whitehorse to play hockey for the local Triple "A" hockey team. Northland is apparently a sponsor of this hockey franchise. According to the employer, Bloski was hired into a "make work" position for the

duration of the hockey season. The employer said that it was assumed that Bloski would have quit when the hockey season ended, however, he did not and it became necessary to let him go on May 15, 1991 because there was essentially little work for him to do. In addition to the lack of work, the employer also claimed that Michael Bloski had opened a business in partnership with another ex-Northland employee on or about May 10, 1991 and that this business venture began to encroach on his work time. The employer said that Bloski had left work early on at least one occasion without permission. He had also ordered parts for his business through Northland's accounts and, he had made long distance telephone calls for his business from Northland's premises and at the employer's expense.

Michael Bloski admitted that his employment with Northland was associated with his hockey career, however, he denied that his job was for a pre-determined period of time. He testified that about August 1990 his employment became permanent when he took over the duties and functions of the shipper and receiver in the warehouse when the previous incumbent left. Bloski also explained about the alleged misuse of the employer's long distance telephone facilities as well as the supposed improper ordering of a part for an old drink machine that had been given to him by the President of Northland. It turned out that none of these incidents were as cut and dried as the employer had made out. Mr. Bloski's explanations did not seem to be unreasonable and it became obvious that none of these incidents had been discussed with Bloski as potential disciplinary considerations. However, they were all brought up in hindsight at the time of his dismissal to justify his

termination. Clearly, Michael Bloski had been treated like a favourite son at Northland for over a year because of his hockey popularity. When the union appeared on the scene, his work habits suddenly became suspect. He was subjected to extra surveillance and records were kept as to what times he was leaving work. The friendly and flexible relationship that he had had with management suddenly evaporated. These are all common indicators of an employer's knowledge of a person's involvement in union activities.

Dwight Kasdorf had been taken on at Northland at the beginning of April when the former highway driver/salesperson left. According to the employer he was hired on a probationary basis and it soon became apparent that he was entirely unsuitable. Kasdorf, who was not an experienced highway driver, was not confident about his ability to make the trip into Telegraph Creek where the employer had eight customers. The employer also claimed that Dwight Kasdorf was not able to do the required maintenance on his truck and that he was permitting his swamper (Gary Zeller) to incur too much overtime. There were supposedly many complaints from customers about Dwight Kasdorf's attitude. We also heard evidence of how the previous highway driver, Mr. Don Laird, had become available for employment and how he had been rehired on May 11, 1991 because he was more experienced than Kasdorf. Don Laird had then, with the full knowledge and consent of Northland's managements, hired his own choice of swamper to work with him on his return to Northland. This meant that both Dwight Kasdorf and Gary Zeller had been replaced without there ever being a hint to them that their work was unsatisfactory. No one had informed Dwight Kasdorf about all his alleged

shortcomings until May 15, 1991 when he was abruptly let go. That is when all of these supposed defects in his work performance were raised. Again, typical employer behaviour when trying to conceal anti-union reprisals.

When Gary Zeller's job as swamper on the highway truck was taken by Don Laird's newly hired helper, he was transferred into the warehouse. There were no reasons given to him for this sudden change in his working conditions. On May 24, 1991 when he received his paycheque it was accompanied by his separation papers. When he inquired what this was all about, he was told that he had given notice that he was leaving on that date to go to Anchorage, Alaska to play hardball. He was astounded at this turn of events and, while he admitted that it had been common knowledge in the spring that he had hopes of attending ball camp at Anchorage this summer, he was sure that he had laid this to rest in April when he had made it clear that he could not afford to leave his employment at Northland. He suspected that the employer was using this as an excuse to get rid of him because of the union's application for certification. Having heard the evidence and having seen the players, we have little doubt that his suspicions are well founded.

To complete the relevant facts, it should be recorded that in response to the application for certification the employer took the position that Dwight Kasdorf and Gary Zeller should not be counted as part of the bargaining unit constituency for determining the wishes of the employees because their replacements had been hired prior to the employer's knowledge of the application for certification. In this regard, there

was some confusion about when Don Laird and the new swamper, Mr. Len Archer, actually commenced work at Northland, however, it became obvious that the employer was anxious to have us believe that they were hired on or prior to the date of the application for certification so that they could be counted as non-union members for the purposes of ascertaining employee wishes as of that date. The employer even went as far as to suggest that Michael Bloski also be excluded from the constituency to be canvassed because of his alleged fixed term of employment. While we do not suggest for one minute that an employer has no role to play in the determination of who is included in a bargaining unit, in these circumstances here, we are satisfied that this employer was trying to shuffle the deck to reduce the chances of the union's application succeeding. This was buttressed by the anti-union petition which the Board received in response to the certification application. It became clear at the hearing into this unfair labour practice complaint that this petition had been instigated by Northland's management team.

### III

The Board's approach to this type of complaint has been well documented and we see no need to restate the applicable principles in any great detail here. It is quite sufficient for our purposes to simply refer to a few recent cases where these principles have been set out at some length and to highlight the fundamental rule that anti-union motives need only be a proximate cause for there to have been a breach of section 94(3)(a)(i) of the Code which provides:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,"

If the exercise of employee rights under the Code is the catalyst in any way, shape or form for action taken against employees then the employer will be found to have violated the Code. Furthermore, there is a burden placed upon employers by section 98(4) of the Code whereby the onus is on an employer to satisfy the Board that any action taken against employees is free of anti-union animus. Obviously, when employees are suddenly let go just after they have joined a union as happened here, this burden of proof becomes even more onerous. For an overview of these principles, see Northern Cruiser Limited (1990), unreported Board decision no. 828; Emery Worldwide (1990), unreported Board decision no. 775; and Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600).

In this case the employer categorically denied that the union's organization campaign had anything to do with the termination of the employment of Messrs. Bloski, Kasdorf and Zeller. In fact, all of the witnesses who testified for the employer were adamant that they knew nothing about the union's activities until the union's

business agent Mr. Don Evans notified the employer on May 14, 1991 that an application for certification had been filed. This we have great difficulty accepting, particularly where Messrs. Gerry Thick and Kelly Kirby are concerned. These two persons are Northland's General Manager and Production Supervisor respectively and, after consideration of the evidence heard during the two days of hearing, we were left with the distinct impression that they knew much more than they let on. In spite of their denials, the only logical conclusion that can be drawn from the evidence is that in this small informal workplace where there are only nine employees in the bargaining unit, Gerry Thick somehow got wind of the employees' meetings with the Teamsters and knew who had signed union cards and that an application for certification was imminent. Gerry Thick then colluded with Kelly Kirby and they took action which they calculated would put an end to the employees' aspirations to participate in collective bargaining.

The actions they chose followed a well known pattern which contained the usual indicia of anti-union motives and employer knowledge that employees are contemplating exercising their rights under the Code. These signs include such things as changes in the atmosphere at the workplace, stricter enforcement of rules, increased surveillance of work habits, the sudden need to record alleged shortcomings in things like punctuality, the dismissal of suspected key union supporters, and the dredging up of all kinds of supposed deficiencies and past conduct of employees to justify termination of employment. Most telling of all is the coincidence of employer action vis-à-vis the exercise of employee rights under the Code.

With all of these ingredients being present in this case along with the questionable credibility of two of Northland's main witnesses, namely Messrs. Thick and Kirby, we have little hesitation in finding that Michael Bloski, Dwight Kasdorf and Gary Zeller were dealt with contrary to section 94(3)(a)(i) of the Code.

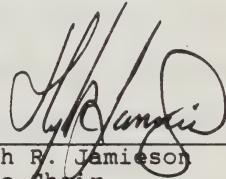
To remedy this situation, pursuant to the remedial powers invested in the Board under section 99 of the Code, we order the following:

- (1) Northland Beverages (1956) Ltd. is to forthwith cease from contravening the Code.
- (2) Michael Bloski, Dwight Kasdorf and Gary Zeller are to be reinstated immediately into their employment as it was prior to the violation of the Code, i.e., Michael Bloski as the warehouse shipper-receiver with all of the duties he had at the time of his dismissal; Dwight Kasdorf as the highway driver/salesperson; and Gary Zeller as the highway truck/swamper.
- (3) Michael Bloski, Dwight Kasdorf and Gary Zeller are to be compensated in the amounts they would have earned had they been working from the day of their dismissals to the date of their reinstatement. This compensation is to include all benefits to which they were entitled; and

- (4) Northland Beverages (1956) Ltd. is to forthwith provide a copy of these reasons for decision to each and every employee in the bargaining unit as well as to its supervisory staff.

The Board will not issue a formal order at this time; however, it retains jurisdiction to do so should the need arise. The Board's Regional Director at Vancouver, Mr. Phil Kirkland, or his designate, is appointed to assist the parties to implement the foregoing remedies.

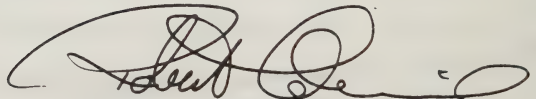
This is a unanimous decision of the Board.



Hugh B. Jamieson  
Vice-Chair



Calvin B. Davis  
Member



Robert Cadieux  
Member

DATED at Ottawa this 30th day of July, 1991.

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## RÉSUMÉ

Le Syndicat des travailleurs de l'énergie  
et de la chimie, requérant, Servichem  
Inc., employeur, et l'Union des chauffeurs  
de camions, hommes d'entrepôts et autres  
ouvriers, section locale 106 du syndicat  
des Teamsters, agent négociateur accrédité.

Dossier du Conseil: 555-3234  
Décision no 886

La question de la compétence  
constitutionnelle du Conseil a été soulevée  
dans le cadre d'une demande  
d'accréditation.

L'entreprise exerce deux activités  
distinctes, à savoir des activités de  
débardage ressortissant à la compétence  
constitutionnelle fédérale et des activités  
d'ensachage et d'entreposage de produits  
en vrac ressortissant à la compétence  
constitutionnelle provinciale.

Le Conseil a décidé que, malgré  
l'existence de deux secteurs d'activités  
distincts, l'entreprise était une et  
indivisible et qu'elle devait relever d'une  
compétence constitutionnelle unique, à  
savoir la compétence fédérale.

## SUMMARY

Energy and Chemical Workers Union,  
applicant, Servichem Inc., employer, and  
Transport Drivers, Warehousemen and  
General Workers' Union, Teamsters Local  
106, certified bargaining agent.

Board File: 555-3234  
Decision no. 886

The issue of the Board's constitutional  
jurisdiction was raised in the context of  
an application for certification.

The business is involved in two distinct  
operations, i.e. longshoring coming under  
federal jurisdiction, and bagging and  
storing bulk merchandise coming under  
provincial jurisdiction.

The Board determined that, despite the  
fact that two separate operations exist, the  
business was indivisible and should come  
under a single constitutional jurisdiction,  
i.e. the federal jurisdiction.



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Reasons for decision

Energy and Chemical Workers  
Union,

*applicant,*

*and*

Servichem Inc.,

*employer,*

*and*

Transport Drivers,  
Warehousemen and General  
Workers' Union, Local 106,

*certified bargaining agent.*

Board File: 555-3234

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The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Evelyn Bourassa and Mr. François Bastien, Members.

Appearances

Mr. Laurent Trudeau, accompanied by Mr. Aimé Raïche, for the applicant;

Mr. André Joli-Coeur, accompanied by Mr. Guy Berthiaume, Vice-President of Servichem Inc., for the employer; and

Mr. Serge Saumur, for the certified bargaining agent.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The proceeding

On November 1, 1990, the Board received an application for certification from the Energy and Chemical Workers Union (the union) to represent the following group of employees:

*"All employees of Servichem Inc. working at 6805 Hébert Blvd., Ville Sainte-Catherine, Quebec, excluding office employees, foremen and those above."*

(translation)

This group of employees was represented by the Transport Drivers, Warehousemen and General Workers' Union, Local 106, under a certification order issued by the Board on February 10, 1987. A collective agreement was concluded. It expired on September 17, 1990. On November 14, 1990, the bargaining agent informed the Board that it had no submissions to make in this file. For its part, the employer initially agreed to the proposed bargaining unit because it resembled the unit described in the existing certification order. However, on February 11, 1991, the union amended its original application to include the position of crane operator. The employer objected to the inclusion of this position in the bargaining unit and, for the first time, claimed that the original application covered the operations at 6805 Hébert Blvd., which were not, or were no longer, under the Board's jurisdiction since this was a local business under provincial jurisdiction. According to the employer, the amendment covered longshoring operations, which came under federal jurisdiction and were separate from the plant operations, and should not be included in the same bargaining unit. In short, the employer claimed that the business operates in two industries that come under different constitutional jurisdictions.

The Board heard the parties on the issue of constitutional jurisdiction at a public hearing on April 26, 1991. The Board's investigation ended on July 16, 1991 when it sent the parties the senior labour relations officer's supplementary report.

## II

### The facts

The evidence concerning the nature of the company's operations and the manner in which they are carried out can be summarized as follows.

1. Servichem Inc. is engaged in the handling, storage, bagging and redistribution of a variety of goods. It offers its customers three types of services, each corresponding to one of the company's three administrative divisions.

- A. The first division consists of the plant. The company began operating this division in 1984-85.

This plant, which belongs to the employer, is located at 6805 Hébert Blvd., Sainte-Catherine, some 20 minutes from downtown Montréal, on land leased from the St. Lawrence Seaway Authority. The plant stores and bags bulk chemical products, essentially soda ash and sodium chloride.

These services consist of the leasing of storage space (elevators and warehouses) and the use of the equipment (forklifts, weigh scales for trucks, conveyor, mechanical cranes, etc.) required to handle and process goods. The company also leases services, i.e. carrying out and supervising the unloading of railway cars or trucks upon their arrival at the bagging plant, as well as storing and loading goods to be delivered later.

The plant division's main customer is an Ontario company, General Chemical Canada Ltd. It uses Servichem as a distribution centre for Quebec and the Maritimes. The performance of this contract represents 75% of the plant's volume of work. Contracts to provide the same services have been

concluded with other companies, such as Canadian Gypsum and Stenchem.

The plant division does not sell or transport goods. These activities are the responsibility of its customers.

The facilities located at 6805 Hébert Blvd. also house the company's administrative services.

- B. The second division is the longshoring division or, as the employer's advertising brochure describes it, the division consisting of bulk storage port facilities.

This division began operations at the end of 1988. At the time, it had only one storage dome, and only one vessel was unloaded. It now has three domes. They belong to the employer and are located along the Seaway on land leased from the St. Lawrence Seaway Authority. The division's street address is 6100 Hébert Blvd., Sainte-Catherine.

This division offers the following services: unloading ships and leasing bulk goods storage space. Goods arrive by boat, are then unloaded, conveyed to the domes and later reloaded on trucks for delivery to buyers. All these operations, including the cleaning of ships' holds, are carried out by the employer's employees. The goods handled consist essentially of livestock feed and grain.

The longshoring division's main customer is CSP Foods Ltd., a Manitoba parapublic sector company. It manufactures Canola meal and rapeseed destined for Quebec's mills. This product is shipped from Thunder Bay aboard ships chartered by CSP Foods Ltd.

The longshoring division provides services to other companies, including Coopérative fédérée. Part of its equipment, in particular the crane, and the personnel required to operate it, are occasionally leased to third parties.

The longshoring service operates while the Seaway is open, i.e., from April to December. During 1990, the division unloaded on average one ship every three weeks. This operation takes approximately 24 hours.

The longshoring division, like the plant division, neither sells nor transports goods.

- C. The third division, known as the cam-rail division, unloads goods on rail.

It operates using conveyors on rail that are located opposite 6805 Hébert Blvd. The equipment is installed on land belonging to Canadian Pacific. This facility has no street address. The evidence shows that this part of the company's activities is rather marginal.

2. The company is managed as follows.

The vice-president, operations and marketing, Guy Berthiaume, is in charge of the three divisions, as well as supervision of the office and benefits. Each division is under the authority of a manager. Robert Paquin manages the cam-rail and longshoring divisions, while Réal Champagne manages the plant division. Luc Charbonneau is foreman in longshoring and shipping. Below are the employees of the various divisions.

When the application for certification was filed, Robert Paquin occupied the position of supervisor. Luc Charbonneau's name did not appear on the employee list provided by employer. Not until the hearing did the employer provide details of the administrative organization of all the company's divisions. The organization chart submitted as a result of this hearing contained changes in the position titles. These differences are not of any great significance, given the actual nature of the duties of the managers and the foreman. We will have more to say on this subject later.

3. When the certification order was issued in 1987, there were four job classifications: forklift operator, receiving clerk, general labourer and probationary or casual employee. The collective agreement established the terms and conditions of employment, including the rates of pay for each of these job classifications.

The employees in these classifications were, and still are according to the organization chart, assigned to the plant division. The volume of business done by this division is such that it can maintain a relatively stable work-force of six to eight regular employees. As for the longshoring division, its volume of business

is not sufficient to hire full-time employees, apart from the crane operator.

This regular full-time position was created in the spring of 1990. A regular, full-time employee, Engelbert Rioux, obtained the position through posting. During 1990, three part-time crane operators, five part-time signalmen-trimmers and five casual signalmen-trimmers worked in the longshoring division. These classifications do not appear in the collective agreement because they did not exist in 1987.

4. The employee list provided by the employer after the application for certification was filed, as well as the detailed organization chart of activities, show that all the positions are filled.

The evidence revealed that the employees from one division also perform duties in other divisions. For example, François Verner, receiving clerk in the plant division, works in the longshoring division during the unloading of ships. He cleans the ship's hold using a payloader at the end of the unloading operation, with the help of the signalmen-trimmers. Cleaning the hold takes approximately 4 of a total of 24 hours required to unload a ship. He may also have performed the duties of a signalman-trimmer. During 1990, he worked 2114 hours in the plant division and 273 in the longshoring division.

This employee also operates the conveyor during unloading on rail, a position that belongs to the cam-rail division.

Sylvain Verner, for his part, a shipping clerk in the plant division, is loaned to the longshoring division where he works 50% of his time. In winter, he ships goods from either the docks or the plant, as required. During 1990, he worked 954 hours at the plant and 1209 in longshoring operations.

Labourers assigned to the plant have on occasion performed the duties of signalmen-trimmers, and signalmen-trimmers have worked in the plant, although the latter situation appears to be less common.

5. Management personnel, i.e. the managers and the foreman, like the employees, occasionally perform duties in another division.

For example, Luc Charbonneau, who has been with the company since May 28, 1990, acts as foreman on the docks and in shipping. Goods are shipped in both the plant and longshoring divisions. Mr. Charbonneau supervises all shipments and hence the employees assigned to these activities. Moreover, managers Paquin and Champagne replace one another as required.

6. The terms and conditions of employment of the employees in the plant division are set down in the collective agreement.

Regular part-time employees, including those in the longshoring division, are paid according to the rates of pay set out in the collective agreement. The overtime provisions are applied to the longshoring division. Pay cheques do not show either the division where employees work regularly or the work location.

All employees of the divisions receive their pay cheques at the plant. The cloakrooms and the punch clock, which are located at the plant, are for the use of all employees.

7. With regard to financial operations, each division, at least the longshoring and plant divisions, is considered a separate profit centre. Financial statements provide for a separate division for each of the company's operations. However, the statement of profits, based on revenues and expenditures, is combined for all the company's operations.
8. In 1990, the longshoring division handled 60 000 tons of goods, while the figure for the plant division was 40 000 tons. Bulk good accounted for \$2/ton, while bagging operations generated \$8/ton. In 1990, the longshoring division's share of profits was larger, given the volume of goods handled.
9. Unloading ships is a relatively simple operation, whereas the bagging operation is more complex and requires more sophisticated equipment and operating procedures.

### III

#### The submissions of the parties

According to the employer, the business is involved in two separate operations that come under different constitutional jurisdictions.

The unloading of ships and the handling of goods (at least until they reach the storage site) in the longshoring division, it argued, are longshoring operations that come,

constitutionally, under federal jurisdiction. Bagging, storage and shipping in the plant and cam-rail divisions are, it claims, purely local operations that fall within provincial jurisdiction. In the employer's opinion, these two operations are so distinct that they necessarily entail the recognition of two businesses, each under a specific constitutional jurisdiction.

The fact that the administration is centralized is not, according to the employer, a determining factor. Among the business's operations none is subsidiary or subordinate to another, which, if they were, would bring them all under a single constitutional jurisdiction. The plant division (bagging) is not an integral and essential part of the operation under federal jurisdiction (longshoring), and a single certification order cannot cover both operations. The employer refers the Board to a number of decisions, including the Privy Council decision in Canadian Pacific Railway Company v. Attorney-General for British Columbia, [1950] A.C. 122 (Empress Hotel); the Supreme Court judgment in Northern Telecom Canada Limited et al. v. Communication Workers of Canada et al., [1983] 1 S.C.R. 733; (1983), 147 D.L.R. (3d) 1; and 83 CLLC 14,048 (Northern Telecom no. 2); and the Board decision in Ottawa-Carleton Regional Transit Commission et al. (1988), 72 di 189; and 19 CLRBR (NS) 165 (CLRBR no. 670).

The union, for its part, argued that the uniquely federal nature of the business is clear because the operations of the longshoring division fall within federal jurisdiction and it follows that the whole business must come under federal jurisdiction.

The similarity and interchangeability of duties and work sites, which vary depending on the contracts to be

performed, and the integrated and centralized nature of the business's various operations, preclude its division. Moreover, the size of the business does not favour such a division. The whole should therefore be declared to be under federal jurisdiction.

#### IV

##### Decision

The Board must first determine whether it has the required constitutional jurisdiction to deal with this application for certification. There are certain facts that are peculiar to the instant case. First, the employer was late in objecting to the Board's constitutional jurisdiction over a part of the business, namely, the plant division, which has been certified by the Board since 1987 without any opposition from the employer. This opposition, expressed when an application was filed to amend the certification to include the position of crane operator that is assigned to the longshoring division, raised the question of the Board's jurisdiction over the operations of the business.

Second, the evidence shows that these operations are normally and habitually carried out in two major and separate areas: the storage and bagging of bulk goods, and longshoring. This situation requires the Board to determine whether the separate nature of these operations means that the business comes under a single constitutional jurisdiction, either federal or provincial, or each operation falls within a separate constitutional jurisdiction.

Federal jurisdiction in the field of labour relations is the exception. This principle was reaffirmed by the Supreme

Court in Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754:

"The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: Toronto Electric Commissioners v. Snider. By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: In re the validity of the Industrial Relations and Disputes Investigation Act (the Stevedoring case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence; ..."

(page 768)

This being the case, the Board's jurisdiction in labour relations matters can be exercised only to the extent that Servichem or a part thereof is a federal undertaking. In making this determination, the Board must examine the nature of the operation in question, having regard to its normal or habitual activities. In Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979) 98 D.L.R. (3d) 1; and 79 CLLC 14,211 (Northern Telecom no. 1), Dickson J. said the following in this regard:

"(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity."

(pages 132; 13; and 143; emphasis added)

With regard to the unloading of ships, which is the responsibility of the longshoring division, the Board notes that

this longshoring operation is an integral part of inter-provincial marine transportation and that this operation is carried out by the employer for the benefit of third parties, in this case CSP Foods Ltd., whose goods are transported through the Seaway from Thunder Bay to Sainte-Catherine. Consequently, this operation falls within federal jurisdiction as defined in section 92(10)(a) of the Constitution Act, 1867. The persons employed here are employed in connection with the operation of a federal undertaking and their labour relations come under federal jurisdiction. (See In the matter of a reference as to the validity of the Industrial Relations and Disputes Investigation Act, [1955] S.C.R. 529; and Cargill Grain Company Limited, Gagnon and Boucher Division v. International Longshoremen's Association, Local 1739, et al. (1983), 51 N.R. 182 (F.C.A.).) On this question, moreover, both the union and the employer pointed out to the Board that the operations of the longshoring division came under federal jurisdiction.

With regard to the operations of the plant division, the Board finds that they are of a local nature and do not come under federal jurisdiction per se. The same is true of the operations of the cam-rail division.

These differences, constitutionally speaking, in the operations of the business raise another question: whether constitutional jurisdiction over the business is one and indivisible or divided. To answer this question, the Board must examine the facts of this case, in the light of the particular and specific circumstances of the manner in which the operations of the business are carried out. This principle was reaffirmed by the Supreme Court in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225,

after it noted that the case law has always focussed on the particular facts of the case involving this matter:

*"It is impossible, in my view, to formulate in the abstract a single comprehensive test which will be useful in all of the cases involving s. 92(10)(a). The common theme in the cases is simply that the court must be guided by the particular facts in each situation, an approach mandated by this Court's decision in Northern Telecom, 1980, supra. Useful analogies may be found in the decided cases, but in each case the determination of this constitutional issue will depend on the facts which must be carefully reviewed as was done by the trial judge in the present appeal."*

(page 258)

This view was also expressed by the Privy Council in Attorney-General for Ontario et al. v. Winner et al., [1954] D.L.R. 657.

The Board must determine whether the employer's business is a single, indivisible undertaking whose operations are integrated to such a degree that its division is precluded, or whether, on the contrary, each of its particular operations can be separated and considered an autonomous going concern that is divisible from the whole.

In Ottawa-Carleton Regional Transit Commission, supra, and Larose-Paquette Autobus Inc. (1990), as yet unreported CLRB decision no. 792, the Board examined the same question, although in different factual situations. These differences, however, have no significance because the test is always the same: whether the undertaking is one and indivisible or consists of two or more businesses themselves comprising different operations that are carried out by the same employer.

The decision as to whether there is one or more businesses has very clearly defined constitutional consequences. For example, if the business in question is declared to be a

single business that is not divisible into a number of separate active or operational entities, then jurisdiction lies in the federal sphere. In AGT, supra, the Court reaffirmed this principle:

*"The case law clearly establishes that if a work or undertaking falls within s. 92(10)(a) it is removed from the jurisdiction of the provinces and exclusive jurisdiction lies with the federal Parliament (City of Montreal v. Montreal Street Railway, [1912] A.C. 333 (P.C.) (hereinafter Montreal Street Railway), at p. 342; Attorney-General for Ontario v. Winner, [1954] A.C. 541 (P.C.) (hereinafter Winner), at p. 568)."*

(page 257)

(See also Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd., [1960] O.R. 497 (H.C.J.); Arrow Transfer Company Limited, [1974] 1 Can LRBR 29 (B.C.); and Shamrock Television System Inc., CKOS-TV and CICC-TV (1987), 70 di 168; and 17 CLRBR (NS) (CLRB no. 639).)

After reviewing all documents on file, the Board concludes that the employer's business is one and indivisible. The centralized direction and control of the business, in terms of both its finances and the management, day-to-day operation and volume of business of the various divisions, means that each of these operations cannot be considered an autonomous undertaking that is capable of operating separately from the whole.

The absence of specialized duties enables the employees to perform interchangeably the duties of the positions in each division. This particular factor contributes to the oneness of the business. Moreover, the existence of similar duties in the various divisions, in particular those relating to shipping, which are performed by the same employees, confirms that the various normal and habitual activities carried out by the employer are closely related. This

integration of duties is also characteristic of the management personnel.

It is well established that a business can engage in separate activities constitutionally (Northern Telecom no. 2, supra, and Empress Hotel, supra). However, where the facts show that a business is one and indivisible and carries out activities between two provinces, jurisdiction lies in the federal sphere. This was established by the Privy Council in Winner, supra. However, it pointed out, in that case, that the business could have been operated differently and could therefore have come under a different constitutional jurisdiction:

*"The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the Province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking."*

(page 680)

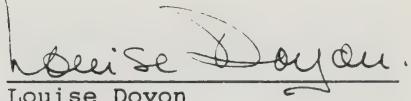
This reasoning applies in the instant case. The Board finds that the labour relations between Servichem and its employees come under federal jurisdiction. It also finds that it has the power to deal with the application for certification now before it.

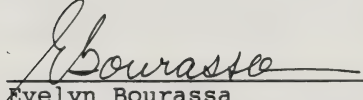
The original application for certification covered a bargaining unit comprising the employees working at 6805 Hébert Blvd. and those working in the cam-rail division. The application to amend was intended to add the employees of the longshoring division and hence to cover all the employer's employees. In this regard, the Board decides that the appropriate bargaining unit must include the employees of all the employer's divisions and its description should read as follows:

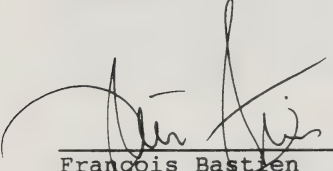
"All employees employed by Servichem Inc.,  
excluding office employees, foremen and those  
above."

After examining the representative character of the union,  
the Board orders the holding of a representation vote, under  
section 29(2) of the Code, among the employees included in  
the above-described bargaining unit. The employees entitled  
to vote are those who are in the employer's employ on the  
date of these reasons.

This is a unanimous decision.

  
\_\_\_\_\_  
Louise Doyon  
Vice-Chair

  
\_\_\_\_\_  
Evelyn Bourassa  
Member

  
\_\_\_\_\_  
François Bastien  
Member

ISSUED at Ottawa, this 7th day of August 1991.



# information

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## RESUME

Le Syndicat canadien de la fonction publique - division du transport aérien, section locale 4033, plaignant, et Air Alliance Inc., intimée.

Dossier du Conseil: 745-3902

Décision n°: 887

## SUMMARY

Canadian Union of Public Employees - Airline Division, Local 4033, complainant, and Air Alliance Inc., respondent.

Board file: 745-3902

Decision No.: 887

Plainte de pratique déloyale de travail. Code canadien du travail (Partie I - Relations du travail). Sous-alinéas 94(3)a(i) et (vi). Alinéa 94(3)c. Moyen de prescription soulevé à l'encontre de la plainte (paragraphe 97(2)). Moyen rejeté et plainte accueillie.

Régime de participation aux bénéfices (RPB) mis en place par l'employeur pendant les négociations avec le syndicat au printemps 1990. RPB jamais négocié entre les parties. Disposition du RPB en excluant les employés qui participent à une grève légale ou illégale. Disposition non contestée à l'époque. Grève des agents de bord à l'été 1990. L'employeur applique RPB en février 1991 et exclut les anciens grévistes de tout paiement.

Au sujet des délais. Le Conseil a jugé la plainte recevable vu qu'elle avait été faite dans les 90 jours de la mise en application de la politique de l'employeur. Toujours possible de contester une politique permanente de ce genre, qui ne doit pas être confondue avec incident isolé dans le temps. Contestable jusqu'à 90 jours après sa cessation.

Sur le bien-fondé. La mise en application de cette exclusion violait directement le Code (sous-alinéa 94(3)a(vi)) et constituait de la discrimination dans une condition d'emploi (sous-alinéa 94(3)a(i)). Notion de condition d'emploi discutée.

Le Conseil a accueilli la plainte, a déclaré la disposition invalide et a ordonné paiement, avec intérêt.

Unfair labour practice complaint. Canada Labour Code (Part I - Industrial Relations). Sections 94(3)(a)(i) and (vi); 94(3)(c). Timeliness challenged (section 97(2)). Objection dismissed and complaint upheld.

Profit-sharing plan (PSP) introduced by employer during negotiations with the union in the spring of 1990. PSP was not negotiated by parties. Provision stating that employees taking part in strike (lawful or unlawful) are not eligible to plan. Policy not challenged at time of introduction. The flight attendants went on strike in the summer of 1990. Employer applied policy in February 1991 and excluded striking employees from any PSP benefit.

Timeliness issue. Board found that the complaint was timely since it was filed within 90 days of implementation of policy. Board also found the policy to be of a permanent nature and which cannot be equated to isolated incident. Always possible to challenge until 90 days following expiry of such policy.

Merits. The implementation of such a policy is in direct violation of section 94(3)(a)(vi) and also a discrimination in a term or condition of employment under 94(3)(a)(i). Concept of term or condition of employment discussed.

The Board allowed the complaint, declared the exclusion null and ordered compensation, with interest.



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Reasons for decision

Canadian Union of Public  
Employees - Airline  
Division, Local 4033

*complainant,*

*and*

Air Alliance Inc.,

*respondent.*

Board File: 745-3902

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The Board was composed of Messrs. Serge Brault and Philippe Morneault, Vice-Chairmen, and Ms. Evelyn Bourassa, Member.

Appearances

Ms. Beverley Burns, assisted by Mr. J.P. Levasseur, business agent, and Ms. Marlène Gauthier, component president, for the Canadian Union of Public Employees - Airline Division, Local 4033; and

Mr. Michel Towner, assisted by Ms. Michèle Pagé, Chief, Human Resources, and Mr. Gilles Filiatreault, P&GM, for Air Alliance Inc.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

On April 10, 1991, the Canadian Union of Public Employees - Airline Division, Local 4033 (CUPE or the complainant), filed a complaint alleging that Air Alliance Inc. (the employer) had contravened sections 94(3)(a)(i), 94(3)(a)(vi) and 94(3)(c) of the Canada Labour Code (Part I - Industrial Relations). Since December 1988, the union has been the certified bargaining agent of the flight attendants of Air Alliance, an affiliate of Air Canada (see Air Alliance (1990), as yet unreported CLRB decision no. 801).

Essentially, the union complains of a provision of the employees' profit-sharing plan established by the employer. This provision states that persons who have participated in a lawful or unlawful strike or who have been locked out are excluded from all profit sharing.

The relevant provisions of the Code read as follows:

*"94.(3) No employer or person acting on behalf of an employer shall*

*(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person*

*(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,*

*...*

*(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;*

*...*

*(c) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of his refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike or subject to a lockout that is not prohibited by this Part; ..."*

A hearing was held in Québec on August 12 and 13, 1991.

## II

### The facts

Air Alliance is a new air carrier that began operations in Quebec in 1988. As its P&GM, Gilles Filiatreault, explained, Air Alliance was seeking at the time to carve out a place in the Quebec regional market, in competition with its main rival, Inter-Canadian. In the winter of 1988,

the union filed its first application for certification with the Board, and was certified for the first time to represent the flight attendants.

In the spring of 1989, negotiations began with a view to entering into a first collective agreement. The P&GM of Air Alliance testified that the company discovered at the time that its main competitor was offering its personnel a profit-sharing plan. Under this plan, 20% of the profits, before taxes and other extraordinary items, are redistributed to eligible employees, in accordance with a procedure determined by the company and summarized in a brochure filed at the hearing. Air Alliance found the idea interesting and asked its chief of human resources to examine it more closely. Michèle Pagé later made recommendations to management which accepted in practice the idea and the formula used by its competitor.

At the end of 1989, employees were informed for the first time of the employer's initiative. They were told of a plan that linked participation with length of continuous, uninterrupted service. Nothing was said about a strike or lockout.

The employer's board of directors established the specific terms of its plan in February 1990. The plan contained the following provisions which gave rise to the instant complaint:

"OBJECTIVES

*The profit-sharing plan is designed to encourage all regular employees to share in the achievements of Air Alliance and to recognize their efforts in performing their work.*

*The plan is also designed to foster in employees, in a tangible way, a greater sense of belonging to and pride in the organization.*

The plan will distribute to all eligible regular employees a sum of money representing 15% of the profits as defined and made by Air Alliance during a fiscal year.

...

#### ELIGIBILITY

All regular employees who have completed a minimum of twelve (12) months of continuous service as of December 31 of each fiscal year are eligible to participate in the plan, provided they have not been absent for a total of six (6) months or more or have not been suspended or dismissed for cause.

...

#### METHODS OF CALCULATION

...

Subject to the exception relating to work stoppages, category 1 employees will share in 55% of the profits to be shared.

...

However, an employee who, during the fiscal year, has participated lawfully or unlawfully in a strike or has been lawfully locked out by the employer, is excluded from all participation in the plan. In this case, the total payroll of category 1 for that fiscal year shall consist of the amount of the total payroll paid to regular employees, minus the pay of the above-excluded employees."

(translation; emphasis added)

The employer invited the employees to a cocktail party in February 1990. The P&GM confirmed that the profit-sharing plan was in operation and distributed personally to the eligible employees cheques representing their share for the year ending December 31, 1989. Eight flight attendants thus received amounts representing approximately 10% of their annual salary. The terms of the plan were again mentioned, without any specific reference to the disputed exclusion.

At the same time, the company and the union had been involved in their first collective bargaining sessions for nearly a year, without success. Negotiations continued into the spring, with little progress, and were close to an impasse.

By then, the company still had not issued an official brochure explaining its plan. The director of personnel decided, at the beginning of April, to order the printing of a brochure at the time when negotiations were continuing to flounder. There was even talk of a strike. At the end of April or the beginning of May, the employer distributed to all employees, in their individual lockers, a copy of a brochure describing the plan in detail. This time the employees saw for themselves the controversial exclusion provision contained in the plan. It caused a commotion.

The union called an emergency meeting. The employees realized that the strike threatened their profit sharing. Earning on average some \$14,000 a year, they undoubtedly still had in their minds the memory of their fellow workers who, scarcely one or two months earlier, had received cheques representing nearly 10% of their annual earnings. The union representative at the time, Raymond Leclerc, reassured them by reading them the Code, in all likelihood section 94. He apparently told them that the exclusion was illegal and that the employer could not apply it without running afoul of the law. However, the union did not complain to the Board nor ask the employer to withdraw this provision. By then, it was May 1990. We should not lose sight of this date, considering that this complaint will be filed in April 1991.

As anticipated, the impasse in the negotiations led to the breaking off of talks and to a strike in mid-June. The ensuing dispute, whose bitterness still lingers, did not end until two months later, on August 26, 1990.

A bone of contention throughout the strike was the issue of pay, which had not been discussed prior to the strike.

Both sides admit that not once during negotiations did the union and the employer discuss the profit-sharing plan. In fact, not until the back-to-work agreement was concluded, after the collective agreement was signed, did Mr. Leclerc ask the employer, and then only once, to waive the exclusion of the strikers from all profit sharing. His request was rejected categorically by the employer's spokesperson, Ms. Pagé, who replied that the employer had no intention of waiving this provision.

Eventually the employees returned to work in September, for the remainder of the year. The final chapter began in February 1991. The P&GM invited all employees to a cocktail party. At this gathering, as at the previous year's cocktail party, a report was presented on the preceding year's operations, and the company's decisions concerning profit sharing for 1990 were announced.

A few flight attendants, including the new union president, sheepishly attended the event. Although the flight attendants were not specifically mentioned at this gathering, they were ignored in that cheques were distributed to all eligible employees and hence not to them. This event took place on February 13, 1991. The complaint was filed on April 10, 1991.

The Board heard the testimony of Stéphan Parent, currently regional union president in Québec. In the spring of 1990, Mr. Parent was employed by Air Alliance in dispatching. He then successfully applied for a position as a flight attendant. He was given the required training. In fact, the employer was preparing him for an anticipated work stoppage since he agreed to replace striking employees. As a matter of fact, he began working as a flight attendant shortly before the strike was declared. He worked during

the strike until June 27, when he was involved in a work accident. The accident immobilized him all summer, until mid-September 1990. Mr. Parent did not receive any profit-sharing payment in February 1991. He was never told why, but in his opinion, it was because he had "participated in the strike." The employer did not contradict this evidence. When asked how he could have "participated" in the strike when he had suffered a work accident, Mr. Parent explained that he had done so by espousing the cause of his striking fellow workers and by joining them on the picket line that had been established in front of the company's offices.

Mr. Filiatreault explained the reason behind the plan's rule whereby the share that would have gone to the striking employees is not redistributed to non-striking employees, but rather retained by the company. According to him, it is used to defray the extra costs that a labour dispute entailed. He added in essence that it was reasonable that those responsible for these costs should not share in the profits. According to statistics compiled by Ms. Pagé, the dispute cost the company some \$150,000. This sum represented, roughly speaking, legal fees, salaries and training of replacement personnel, security and advertising. This figure compared with some \$38,000 in profits that would otherwise have been distributed to some 40 flight attendants had they not participated in the strike.

### III

#### Arguments

##### For the employer

Counsel for Air Alliance argued, first, that the complaint was untimely under the provisions of section 97(2), which reads as follows:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

(emphasis added)

According to counsel, the employees knew explicitly of the exclusion in question in May 1990 and did not exercise any recourse against it. Citing the Board decision in Air Canada (1977), 24 di 203 (CLRB no. 113), Mr. Towner argued that the time limit for exercising the recourse began to run on the day when the company clearly published this exclusion in May 1990. Consequently, waiting until April 1991 to bring the complaint prescribed it.

Counsel argued, second, that, in view of the actual wording of section 94(3)(a)(i), it could not be invoked in this case because, he said, it did not apply to a term or condition of employment or to pay. Citing the Supreme Court judgment in Le Syndicat catholique des employés de magasins de Québec Inc. v. La Compagnie Paquet Ltée, [1959] S.C.R. 206; and the decision in Bell Canada (1981), 42 di 298; [1981] 2 Can LRBR 148; and 81 CLLC 16,083 (CLRB no. 292), counsel argued that profit sharing did not constitute, in the instant case, a term or condition of employment or pay within the meaning of this provision. Counsel compared the text of section 94(3)(a)(i) with the text of section 50(b) of the Code. He added that the payments in question did not constitute either pay or a term or condition of employment, but rather a right or privilege, a concept contained in section 50, but not in section 94. Therefore, the payments were excluded from the application of section 94. In short, the exclusion ordered by the employer and its subsequent application were not covered by this provision.

Counsel added that the union did not present the slightest evidence of anti-union animus on the part of the employer, a prerequisite for imposing a penalty under this provision of the Code. On the contrary, he argued, Air Alliance merely took a page from the book of its main competitor, Inter-Canadian, and this action was taken wholly outside the context of collective bargaining. Finally, counsel noted that neither the employer nor the union raised the question of this exclusion during negotiations and that only after the collective agreement was signed did the union allude to it, and then only half-heartedly.

Drawing on the common law theory of estoppel, counsel argued that the union was estopped from raising the illegality of the exclusion. Since it had not complained of the exclusion in time, it had, for all practical purposes, accepted the exclusion, thereby leading the employer to believe that it was satisfied with the exclusion. According to counsel, it would be improper to let the union off the hook and thus condone, as if nothing had happened, its negotiating a collective agreement without raising the exclusion, with the ulterior motive of having it declared of no effect in a subsequent proceeding. Counsel cited in this regard E.E. Palmer in Collective Agreement Arbitration in Canada, 3rd edition (Toronto: Butterworths, 1991).

Finally, counsel argued that if all his other arguments failed, the Board could not in any case allow the complaint and order the company to make cash payments. All the Board could declare was that the exclusion, and hence the entire plan, was of no effect. Citing also in this regard the judgment in Compagnie Paquet Ltée, supra, counsel suggested that the fact that the collective agreement made no provision for the plan contravened the requirement arising

from the definition of "collective agreement" in section 3(1) of the Code:

*"'collective agreement' means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters."*

For the union

Regarding the timeliness of the complaint, counsel for the union argued that the existence of this exclusion constituted in itself an ongoing contravention of the Code. It was an ongoing form of intimidation whose existence alone, as long as it remained, entitled the union to seek relief. According to counsel, since the policy was still in effect, the union was today still entitled to challenge it. In support of this argument, counsel cited the decision in Brewster Transport Company Limited (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574), affirmed by the decision of a reconsideration panel (Brewster Transport Company Limited (1986), 66 di 133; and 86 CLLC 16,045 (CLRB no. 580)).

Moreover, there were two different grounds of complaint here: the first relating to the actual existence of the exclusion and the second relating to its application to the employees after the strike. According to counsel, both grounds were valid and each would produce a different result in terms of calculating the time limit.

Regarding anti-union animus, counsel argued that the very existence of the exclusion presupposed unlawful intent, and that anti-union animus was established by the facts as a whole.

In reply to the argument comparing sections 50 and 94 of the Code, counsel argued that the payments received by the employees under the terms of such a plan unquestionably constituted pay or a term or condition of employment within the meaning of section 94(3). In support of her argument, counsel cited Eastern Provincial Airways Limited (1983), 54 di 172; 5 CLRBR (NS) 368; and 84 CLLC 16,012 (CLRB no. 448).

#### IV

#### Analysis

The Board must answer two questions: first, is the complaint timely and, second, if so, is there merit to it?

#### Timeliness

On the question of timeliness, counsel for Air Alliance cited Air Canada, supra. In that case, the pilots' union at Air Canada alleged a contravention of section 50. Although subject to another condition (section 97(3)), filing such a complaint is nevertheless subject to the same timeliness provision, namely, section 97(2). Air Canada had announced in March a policy that ended the right of pilots to travel first class. The union knew of the policy several months before it was in fact applied. In order to file a complaint, the union first had to obtain Ministerial consent under section 97(3). It was more than 90 days after the union knew of the policy that it in fact complained to the Board. The employer alleged, as does the employer in the instant case, that the complaint was untimely. The Board had the following to say regarding timeliness:

*"... If the date for calculating the period is the date on which the consent was granted, the union's position, then the complaint is within ninety days from the date on which the complainant knew of the 'circumstances giving rise to the complaint'. As a matter of general policy in the interpretation of section [97(3)] the position of the union is persuasive, but*

*difficult to reconcile with the language. However, we do not consider that we must decide that issue because the earliest date at which the union could have known of the 'action' giving rise to the complaint is May 1, 1977, the date of implementation of the change. ...*"

(page 217; emphasis added)

In the instant case, this exclusion was not applied until February 1991. The complaint is therefore timely.

As the Board stated in Air Canada, supra, the time limit begins to run when the policy that is considered questionable is implemented. It is clear, then, that the dispute turns at least in part on the implementation of the policy, rather than on its existence or its wording. So long as the company had not made any profits in 1990, this policy existed in theory only. So long as no employees who exercised their right to strike were the victims, so to speak, of its application, not one had reason to complain about its application per se. Had a complaint challenging the application of this policy been made in September 1990, it undoubtedly would have been dismissed by the employer as premature. One could therefore validly consider that no profit sharing could take place before the end of the calendar year and, indeed, before knowing whether the company had indeed made any profits.

The foregoing is sufficient reason to reject the timeliness argument. However, there is more to it. The rights that the union is claiming here are rights conferred by section 8 of the Code, which reads as follows:

*"8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.*

*(2) Every employer is free to join the employers' organization of his choice and to participate in its lawful activities."*

These rights are permanent by nature, as are the obligations arising from them. The Interpretation Act, R.S.C., 1985, c. I-21, clearly says so:

*"Law Always Speaking*

*10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning."*

The adoption by a company of a personnel management policy, one of whose components would systematically gut the basic provisions of the Code, cannot be considered merely an isolated contravention that is limited in time. Where a contravention occurs that is, by its very nature, ongoing, it cannot be artificially frozen in time, thereby limiting the period of time for challenging it. It has always been said, of the obligation to bargain in good faith, that it applies throughout the negotiations. This is especially true of what could be termed the ongoing obligations that arise from section 8 and that apply permanently to the conduct of the partners governed by the Code.

This being the case, the intent of section 97(2), as regards the timeliness of a complaint, is not to ensure that a party that systematically contravenes the Code can do so with impunity, but rather to prevent repeated proceedings. In this type of case, the time limit does not begin to run until the unlawful conduct has ceased. In the instant case, this would apply to the policy itself.

The Board had the following to say on the subject:

*"Since a complaint alleging failure to bargain in good faith deals with a course of conduct, the 90-day time limit for a complaint about the entire course of conduct starts to run only at the end of the course of conduct. ...*

... Section 187(2) is designed to prevent complainants from being deleterious about pursuing their rights once the conduct being complained of has terminated. It is not designed to promote multiple applications, nor to frustrate a complainant awaiting Ministerial consent, nor to protect a respondent who is continuing to act in an ongoing pattern of illegal conduct."

(Brewster Transport Company Limited (574), supra, pages 36; 377; and 14,384-14,384)

[See also Iberia Airlines of Spain (1990), as yet unreported CLRB decision no. 796 (pages 5 to 11); affirmed by the Federal Court of Appeal in Iberia Spanish Airlines, S.A. v. Canadian Union of Public Employees, Local 4027, et al., judgment rendered from the bench, file no. A-422-90, February 18, 1991.]

Be that as it may, there is no doubt that one of the actions of which the union complains and which did not occur until February 13, 1991 was the denial of payment of profits to the employees who participated in the strike, which payment these employees are now seeking. The fact that the employer's answer to the request for payment and its reason for denying payment had existed for some time in no way alters the fact that it did not invoke this reason until the point at which it actually decided not to make this payment, i.e. in February 1991. This is precisely the type of incident the Board had in mind in Air Canada, supra, when it spoke of the "action" giving rise to a complaint. Consequently, the Board rejects the employer's argument regarding timeliness.

#### The merits

Does this payment by the employer constitute a term or condition of employment? Unquestionably, it does. Whether we call this payment pay, compensation, benefit, privilege or otherwise, the fact remains that it constitutes, in fact, a form of compensation and a term or condition of employment of the flight attendants, as well as of the other employees

of Air Alliance. The employer cited Compagnie Paquet Ltée, supra, to support its argument that the absence from the collective agreement of a provision dealing with the profit-sharing plan meant that the plan was not a "term or condition of employment" within the meaning of section 94(3)(a).

The Supreme Court was called upon to decide whether the Rand Formula, i.e the compulsory payment of union dues, constituted a valid term or condition of employment, as it also applied to non-unionized employees. The Court answered yes and declared that the certification system leaves no room for private negotiation between employer and employee. This is not the question before us in the instant case: the employer did not impose a payment on the employees, but rather it made a payment to them. Nor is it necessary to examine the purely theoretical aspect of the question. Whichever way we look at it, the employer decided, moreover, unilaterally, to reward regular attendance at work and continuous employment by making a payment in addition to pay, over and above what was payable under the collective agreement. This action, moreover, did not involve private negotiation that the Supreme Court judgment would prohibit.

We now turn to the collective agreement. Counsel for Air Alliance cited clause 1.02 of this agreement (purpose of the agreement) to support his argument that the plan at issue here is in no way defined by the collective agreement, is extraneous to it and, in the final analysis, contrary to it and hence of no effect. Although this argument is clever, it is based on an incorrect premise. While we do not have to deal with this question, it seems clear to us that the relevant clause of the collective agreement is 2.02, the residual clause. This clause deals in fact with subjects not covered in the collective agreement and expressly

recognizes the right of the employer to act on these matters.

*"2.02 The company retains the rights and powers that it had prior to the signing of this agreement, excluding those rights and powers that this agreement limits, delegates, grants or amends."*

(translation)

This also answers counsel's final argument that the entire plan is of no effect if the exclusion is invalid (see also Eastern Provincial Airways Limited, supra).

There remains the question of anti-union animus. Section 94(3)(a)(vi) speaks, in the past tense, of an employer's disciplining a person who "has participated in a strike" that is lawful. Whether motivated by anti-union animus or not, a policy or action of the employer that penalizes persons because they have participated in a strike clearly contravenes this provision. In this case, the employer does not deny that it imposed an economic sanction; indeed, it asserts its right to do so in its reply to the complaint:

*"21. Without prejudice to the foregoing, it is more than reasonable for the respondent to include such an exclusion, i.e. excluding striking employees from enjoying the company's profits, since these employees, through their action, have caused the company to incur substantial expenses, a premise that is fundamental to the very nature of such a plan; ...*

(translation; emphasis added)

We know that this is precisely the kind of economic sanction that is the essence of a strike and hence of a lawful strike that is sanctioned by the Code. We do not see how such a spontaneous admission could mask the anti-union animus that alone can inspire this admission.

The explanation Mr. Filiatreault gave at the hearing is also revealing. The plan provides in fact that an employee who is absent from work for less than six months during a given year is still eligible to share in the profits. Thus, an employee who is absent for one, two, three, four or five months on sick, maternity or any other type of leave is not excluded. When asked whether this time condition applied to participation in a strike, Mr. Filiatreault replied spontaneously that the length of the strike was not relevant; what counted was the "participation."

Finally, the chronology of events that preceded and attended the publication of this exclusion proviso also confirms, in our opinion, that they were motivated by anti-union animus. The union requested conciliation in the fall of 1989. It was at this time that the company made public the idea of profit sharing. On January 24, 1990, the day after it tabled its final offers, the employer invited the employees to a gathering at the Château Bonne-Entente (!) to be held on February 12. However, the company did not formally adopt its regulation (document no. 15) until February 12. On the evening of that same day, it distributed cheques to several employees, including eight flight attendants. It was when the union was seeking a strike mandate that the company decided to distribute the specific text of its profit-sharing policy. This was at the end of April 1990, two months after the last payments were made and ten months before the next payments. Why did it distribute its policy at this time, if not to try and influence a vote that was scheduled for May? In effect, the desired result was achieved, and the union had to pick up the pieces.

Clearly the union could at least have formally complained of this conduct well before this. However, for reasons known only to it, it decided instead to wait and see if the

company was also going to carry out the threat. Even though its recourse was still timely, it had no effect on the most pernicious aspects of this anti-union policy. By this, we mean this form of psychological blackmail that pervaded the negotiations as the result of this policy. An employer cannot, through its in-house regulations, contravene public policy provisions. The imposition by Air Alliance on its employees of terms or conditions of employment that penalized them financially for participating in a lawful strike contravenes the Code. The complaint is therefore allowed.

V

Conclusion

Section 99 of the Code sets out the Board's remedial powers where there has been a contravention of section 94.

The Board declares of no effect and unlawful the exclusion, described in Air Alliance's profit-sharing plan, linked to the participation in a lawful work stoppage.

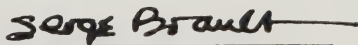
The Board also declares unlawful the employer's decision not to pay in February 1991 the flight attendants otherwise eligible for its profit-sharing plan because they had participated in a lawful strike during 1990. The Board declares this exclusion inapplicable to the employees in question and orders Air Alliance to remove it from any publication intended for its personnel.

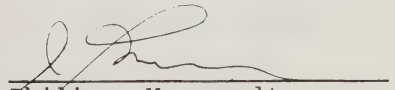
The Board further orders the employer to pay the flight attendants who were in its employ on February 12, 1991 and were otherwise eligible under the terms of this profit-sharing plan an amount equivalent to the amount they were denied as the result of this contravention of the Code. The

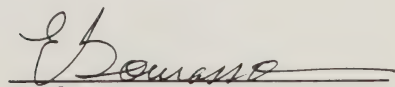
amounts owed the flight attendants shall be paid to them no later than September 15, 1991, with interest calculated using the method described in Samuel John Snively (1985), 62 di 112; and 12 CLRBR (NS) 97 (CLRB no. 527), from February 12, 1991 until the date of payment. The Board feels that, in the instant case, the payment of interest over and above what was in fact unlawfully withheld is required in order to fully remedy the financial loss sustained as the result of the employer's unfair practice. To proceed otherwise in the instant case would allow the employer to further penalize unlawfully the employees by committing a flagrant unfair labour practice.

The Board reserves the right to determine the amount owed each employee affected should the parties fail to agree on this amount. To this end, the Board appoints Ms. Suzanne Pichette, acting director of its Montréal regional office, or any other senior labour relations officer she might designate, to assist the parties in implementing this decision.

Finally, the Board reserves the right, under section 20(1) of the Code, to order any further remedy which might be warranted.

  
Serge Brault  
Vice-Chairman

  
Philippe Morneault  
Vice-Chairman

  
Evelyn Bourassa  
Member

ISSUED at Ottawa, this 23rd day of August 1991.



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## Summary

RONALD K.J. MAH, COMPLAINANT; CANADIAN  
UNION OF POSTAL WORKERS, RESPONDENT;  
AND CANADA POST CORPORATION, EMPLOYER.

Board File: 745-3796

Decision No.: 888

## Résumé de Décision

RONALD K.J. MAH, PLAIGNANT; LE  
SYNDICAT DES POSTIERS DU CANADA,  
INTIMÉ; ET LA SOCIÉTÉ CANADIENNE DES  
POSTES, EMPLOYEUR.

Dossier du Conseil: 745-3796

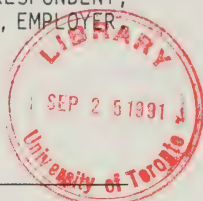
N° de Décision: 888

Ronald K.J. Mah complained that the Canadian Union of Postal Workers (CUPW) had breached its duty of fair representation under section 37 of the Canada Labour Code (Part I - Industrial Relations) by refusing to proceed with grievances on his behalf over alleged contraventions of the collective agreement regarding unequal distribution of overtime work and the failure to post equal opportunity overtime lists. Mr. Mah also alleged bias and/or conflict of interest on the part of CUPW's grievance officer whose wife was the recipient of the bulk of the alleged unfair distribution of overtime.

Ronald K.J. Mah s'est plaint que le Syndicat des postiers du Canada (SPC) avait manqué à son devoir de représentation juste prévu par l'article 37 du Code canadien du travail (Partie I - Relations du travail) en refusant de traiter des griefs en son nom portant sur des présumées contraventions de la convention collective en raison d'une répartition inégale des heures supplémentaires et du défaut d'afficher des listes permettant l'égalité des chances d'accès aux heures supplémentaires. M. Mah alléguait également qu'il y avait partialité et conflit d'intérêt ou les deux de la part de l'agent des griefs du SPC puisque l'épouse de ce dernier était la principale bénéficiaire de la répartition présumée injuste des heures supplémentaires.

The complaint was dismissed as being without merit and also untimely under section 97(2) of the Code. Initially the matter was dealt with by a quorum of the Board without a public hearing, however, after an application for reconsideration under section 18 of the Code by Mr. Mah, the complaint did proceed to a hearing before a differently constituted panel which paid particular attention to the allegations of bias and conflict of interest. No grounds to substantiate a breach of the Code were found.

La plainte a été rejetée parce qu'elle était sans fondement et qu'elle avait été présentée hors délais en vertu du paragraphe 97(2) du Code. La question a d'abord été traitée par le Conseil sans qu'une audience soit tenue. Cependant, après la présentation d'une demande de réexamen fondée sur l'article 18 du Code par M. Mah, la plainte a fait l'objet d'une audience tenue par un différent banc de membres qui a porté une attention particulière aux allégations de partialité et de conflit d'intérêt. Le Conseil n'a trouvé aucun motif qui justifierait une allégation de manquement au Code.



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Reasons for decision

Ronald K.J. Mah,  
*complainant*,  
Canadian Union of Postal  
Workers,  
*respondent*,  
and  
Canada Post Corporation,  
*employer*.

Board File: 745-3796

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The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. Ronald K.J. Mah, for himself;  
Mr. Stuart Rush, for the Canadian Union of Postal Workers; and  
Mr. Sean Kennedy, for Canada Post Corporation.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with a complaint under the duty of fair representation provisions in section 37 of the Canada Labour Code (Part I - Industrial Relations):

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

In the complaint, Mr. Ronald K.J. Mah alleged that the Canadian Union of Postal Workers (CUPW or the union) had breached its duty of fair representation by refusing to process grievances on his behalf over unfair distribution of overtime at the Revenue Protection Department at Vancouver where Mr. Mah is employed by Canada Post Corporation (CPC or the employer). The grievance also touched upon the alleged failure by CPC to post equal opportunity overtime lists which is a requirement of the collective agreement between CUPW and CPC.

The complaint, which was filed with the Board on November 27, 1990, was dealt with by a differently constituted quorum of the Board in May 1991. That panel, which included Vice-Chair Thomas M. Eberlee and Members J.-Jacques Alary and François Bastien, used the Board's powers under section 98(2) of the Code to dispose of the matter without a public hearing and dismissed the complaint as being without merit. That decision was communicated to the parties by way of a letter decision over the signature of Member J.-Jacques Alary dated May 22, 1991. The following excerpts from that letter portray the gist of the decision:

"...

*Mr. Ronald Mah, the complainant, argues that the Canadian Union of Postal Workers (hereafter called CUPW) violated section 37 of the Code by refusing to initiate grievances on his behalf with respect to his claim for equal opportunity for overtime work. Mr. Mah works in the Revenue Protection, Collection Section, Canada Post Corporation, where usually 6 to 8 persons, including a supervisor, work in the department. Mr. Mah explained that all jobs are interchangeable and are the same, but for operational requirements, the starting times are staggered, commencing at 7, 8, 9 and 10:00 a.m.*

*The complainant contends that he attempted on three occasions to initiate a grievance in respect of equal opportunity for overtime work, but CUPW refused to draft a formal grievance on his behalf.*

...

*CUPW contends that after giving each grievance a proper and reasonable assessment, it concluded that Mr. Mah did not have reason to grieve. CUPW argues that it advised verbally Mr. Mah of the reasons for not submitting his grievances. An offer was made for Mr. Mah to speak to the Regional Grievance Officer or National Grievance Officer to have the decision reviewed, but Mr. Mah never acted on this offer. CUPW contends that it has a right to interpret the collective agreement without being subjected to the Board's review.*

*The arguments filed by the two parties show that the issue was the proper interpretation of Article 15.15 regarding the 'definition of complement' and, by implication, Article 13.01 concerning the definition of shifts. The complainant contends that although the starting times in his department are staggered commencing at 7, 8, 9 and 10:00 a.m., they are the same normal working hours as they are part of the day-shift. CUPW argues that this is not the case and makes a difference between working hours and shift.*

...

*In this particular case, the Board concludes that CUPW's decision not to process Mr. Mah's grievances was not arbitrary or discriminatory or done in bad faith. For those reasons, the Board dismisses the complaint."*

On June 11, 1991, Mr. Mah filed an application under section 18 of the Code seeking a review of the foregoing decision (Board file 530-1977). This application highlighted certain aspects of the complaint which had not been made clear in the original submissions. For example, it was clearly brought home in the review application that the wife of CUPW's grievance officer, Mr. Brian Nelson, who had refused to process Mr. Mah's grievances worked in the same section as Mr. Mah at CPC and she had been the main recipient of the excessive overtime about which Mr. Mah was complaining.

In keeping with the Board's normal review process, Mr. Mah's application was considered by a quorum of the Board consisting of the Chair and two Vice-Chairs who had not been involved in the original decision. In light of the new facts contained in the application, the file was referred back to the original panel for its consideration. On July 12, 1991, the original panel rescinded its decision of May 22, 1991 and the whole matter was set down for a hearing. This hearing took place at Vancouver on August 13, 1991 before this panel of the Board.

## II

At the hearing the Board heard the evidence of Mr. Brian Nelson regarding his handling of Mr. Mah's grievances and particular attention was paid to possible bias or bad faith because of the involvement of Mr. Nelson's wife. In this regard, it goes without saying that it would have been prudent for Mr. Nelson to have removed himself from this situation of apparent conflict of interest. There were other CUPW officers who could have handled Mr. Mah's grievances. This would have eliminated the basis for Mr. Mah's concerns about bias.

However, Mr. Nelson did handle the grievance and, taking everything into consideration the Board is satisfied that there are no grounds to find a violation of the Code because of conflict of interest or bias on Mr. Nelson's part. According to other senior union officers from both the local and regional levels of CUPW who were

called by both the union and by Mr. Mah, Mr. Nelson correctly interpreted the collective agreement vis-à-vis the distribution of overtime. Also, the arbitral jurisprudence that he relied upon when he decided there were no grounds for a grievance on this topic was right on point. Some union officials said that they would probably have taken the grievances because of the apparent breach of the collective agreement by the employer's failure to post equal opportunity overtime lists but these are obviously hindsight judgement calls which have little or no bearing on the issues before us. We are not about to second guess Mr. Nelson's decisions and we are certainly not going to replace his thinking with our own. The Board's role is not to sit in appeal from decisions of bargaining agents' representatives, it is to ensure that such decisions are free from arbitrariness, discrimination and bad faith. Having listened to Mr. Nelson and having had the opportunity to assess his credibility, we are satisfied that none of these elements are present here.

Regarding the non-existence or non-posting of the equal opportunity lists, Mr. Nelson testified that he did investigate these allegations with the supervisor and there were lists in existence. They were being kept in the supervisor's desk drawer because of some alleged difficulty with their constant disappearance. Mr. Nelson said that he had accepted this explanation and decided not to pursue this aspect of the grievances. This testimony of Mr. Nelson was corroborated to some extent by the evidence of Mr. David Watters, the incumbent supervisor who was called by Mr. Mah. He testified that when he took over some time in August 1990, he did find some equal opportunity lists in the

desk drawer. Although he said these lists were not up to date and that he had to reconstruct them with information from the payroll department, the fact that he found them in the supervisor's desk drawer supports Mr. Nelson's testimony. Perhaps Mr. Nelson did not go as far as he might have regarding these lists but this in itself is not a violation of section 37 of the Code.

In the absence of grounds to support Mr. Mah's allegations of bias on Mr. Nelson's part, this complaint boils down to the issues identified by the original panel of the Board in its May 22 decision. This is simply a dispute over the proper interpretation of certain provisions of the collective agreement. As we said earlier, there is nothing to support the contention that the union's interpretation was arrived at in an arbitrary fashion. There was certainly nothing discriminatory in the union's stance and any hint of bad faith on Mr. Nelson's part was cleared up at the hearing. In short, there are no grounds to support a finding of a violation of the Code; the complaint is without merit and it is dismissed accordingly.

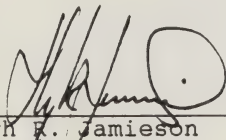
There was one other issue that came to light at the hearing into this complaint which was not raised by the parties and that was not apparent from the original pleadings. This was the timeliness of the complaint under section 97(2) of the Code which provides:

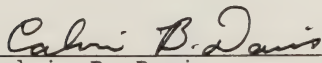
*"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."*

As the hearing progressed it became obvious to the Board that Mr. Mah was aware of the circumstances giving rise to his complaint as early as March or April 1990 when he had unsuccessfully tried to file two grievances over the alleged non-existence or non-posting of the equal opportunity overtime lists and the purported unfair distribution of overtime. By then he had been told clearly by Mr. Nelson of the union's position and that his grievances were not being pursued. Mr. Mah did not file his complaint with the Board until November 1990, which was well after the expiry of the 90-day time limit. The fact that he attempted to file another grievance in September 1990 on the same grounds and that he was met with the same refusal does not re-open the time limits under section 98(2). (See Garry Lloyd Ager (1990) unreported Board decision no. 823, and Brian J. O'Connor, (1991), unreported Board decision no. 871).

This complaint is not only without merit, it is also untimely.

The foregoing is a unanimous decision.

  
\_\_\_\_\_  
Hugh R. Jamieson  
Vice-Chair

  
\_\_\_\_\_  
Calvin B. Davis  
Member

  
\_\_\_\_\_  
Michael Eayrs  
Member

DATED at Ottawa this 30th day of August, 1991.



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## Summary

PETER KLIPPENSTEIN, COMPLAINANT;  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,  
RESPONDENT; VIA RAIL CANADA INC.,  
EMPLOYER; AND CANADIAN NATIONAL  
RAILWAY COMPANY, INTERESTED PARTY.

Board File: 745-3622

Decision No.: 889

## Résumé de Décision

PETER KLIPPENSTEIN, PLAIGNANT; LA  
FRATERNITÉ DES INGÉNIEURS DE  
LOCOMOTIVES, INTIMÉE; VIA RAIL CANADA  
INC., EMPLOYEUR; ET LA COMPAGNIE DES  
CHEMINS DE FER NATIONAUX DU CANADA,  
PARTIE INTÉRESSÉE.

Dossier du Conseil: 745-3622

N° de Décision: 889

Peter Klippenstein filed a complaint  
against the Brotherhood of Locomotive  
Engineers (BLE) alleging that the  
union failed to represent him within  
the standards contemplated by the duty  
of fair representation provisions of  
section 37 of the Canada Labour Code  
(Part I - Industrial Relations) when  
a medical restriction prevented Mr.  
Klippenstein from performing his  
duties as a locomotive engineer.

The complaint was dismissed. The  
Board was satisfied that the BLE had  
represented Mr. Klippenstein in a  
manner that was not arbitrary,  
discriminatory or in bad faith.  
Through the auspices of the Board, Mr.  
Klippenstein had undergone a medical  
examination and had been returned to  
work. The Board declined to go to  
hearing on the issue of the union's  
liability for lost wages, benefits and  
legal costs.

Peter Klippenstein a déposé une  
plainte contre la Fraternité des  
ingénieurs de locomotives (FIL)  
alléguant que le syndicat ne l'avait  
pas représenté selon les normes  
prescrites par les dispositions de  
l'article 37 du Code canadien du  
travail (Partie I - Relations du  
travail) portant sur le devoir de  
représentation juste lorsqu'il avait  
été empêché d'exercer ses fonctions  
d'ingénieur de locomotive pour des  
raisons médicales.

La plainte a été rejetée. Le Conseil  
est convaincu que la FIL a représenté  
M. Klippenstein d'une façon qui  
n'était ni arbitraire, ni  
discriminatoire ni de mauvaise foi.  
Sur la recommandation du Conseil, M.  
Klippenstein a subi un examen médical  
et est retourné au travail. Le  
Conseil a refusé de tenir une audience  
sur la question de la responsabilité  
du syndicat en regard du salaire et  
des avantages perdus ainsi que des  
frais judiciaires.

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Reasons for decision

Peter Klippenstein,  
*complainant*,  
Brotherhood of Locomotive  
Engineers,  
*respondent*,  
VIA Rail Canada Inc.,  
*employer*,  
and  
Canadian National Railway  
Company,  
*interested party*.

Board File: 745-3622

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The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances (on record):

Mr. Glenn Tait, succeeded by Mr. Hugh J.D. McPhail, for Peter Klippenstein;

Mr. James L. Shields, for the Brotherhood of Locomotive Engineers;

Ms. Anne Cartier, for VIA Rail Canada Inc.; and

Mr. K.G. Macdonald, for Canadian National Railway Company.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with a complaint against the Brotherhood of Locomotive Engineers (BLE or the union)

under the duty of fair representation provisions contained in section 37 of the Canada Labour Code (Part I - Industrial Relations).

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

The question at this time is whether the Board ought to reconvene a public hearing which was adjourned sine die on October 29, 1990 after the parties had arrived at a settlement of some of the issues raised by the complaint.

As background, the complainant, Mr. Peter Klippenstein, has been employed by VIA Rail Canada Inc. (VIA Rail) as an Engineer/Brakeman since 1988. Prior to that he was an employee of Canadian National Railway Company (CN Rail).

In March 1989 Mr. Klippenstein was diagnosed as having multiple sclerosis. In August 1989 Mr. Klippenstein was placed under a medical restriction after an examination by a doctor of CN Medical Services. The restriction prohibited Mr. Klippenstein from operating tracked motor vehicles including locomotive engineers.

There is some confusion in the file as to what happened after that. The BLE became involved and, according to the union, Mr. Klippenstein had asked to be transferred back to CN Rail. His concern was apparently about the viability of VIA Rail in the event he had to take a

disability pension. Also, there are greater opportunities to do yard work at CN Rail, however, Mr. Klippenstein would have to have obtained a medical clearance to operate locomotives, even on a restricted basis. Documentation on file shows that at one stage VIA Rail was under the impression that the complainant had already transferred to CN Rail. At that time, CN Rail, in co-operation with the BLE was attempting to have Mr. Klippenstein placed on the disability rehabilitation list but this could not happen until he used up his sick benefits which came from VIA Rail. It became clear later in the submissions, however, that Mr. Klippenstein was an employee of VIA Rail on leave of absence.

In some early submissions, the union claimed to have filed a grievance on Mr. Klippenstein's behalf. This was later retracted and the union took the position that there was no grounds for a grievance until Mr. Klippenstein obtained further medical evidence to refute the basis for the medical restrictions that had been imposed upon him. The union also said that its attempts to have Mr. Klippenstein transferred to CN Rail had been frustrated by his own intervention and his constant changes of mind. Mr. Klippenstein denied having asked for a transfer, and said that he did not apply for a disability pension. He insisted that he had demanded that the union grieve the medical restriction and that it had failed to do so.

In this regard there appears to be some doubt as to whether medical restrictions are grievable. CN Rail said that even if the BLE had grieved, it would not have accepted the grievance because in its view medical

restrictions are not grievable. VIA Rail had a different view. It said that medical restrictions could be grieved but that an arbitrator could hardly overrule a medical restriction and would probably only refer the matter to another doctor for an additional medical opinion.

This was the key that the Board zeroed in on at a hearing at Edmonton on October 29, 1990. Prior to the commencement of the hearing, at a pre-hearing meeting with counsel the Board urged the parties to attempt to settle this matter at least to the extent related to Mr. Klippenstein's medical condition and his ability to work as a locomotive engineer. It was clear to the Board that even if the hearing proceeded and if the Board determined that the BLE had somehow breached its duty of fair representation and ordered that the matter be taken to arbitration, the outcome would probably be another medical examination to re-assess Mr. Klippenstein's degree of disability. This option was right there for the parties to agree to without the need to wait for the grievance-arbitration process. As a result of the Board's prodding, an agreement was struck between Mr. Klippenstein and the union which basically provided that Mr. Klippenstein would undergo a medical examination to assess his capability to work as a locomotive engineer. If a favourable medical opinion was obtained and if the employer refused to return Mr. Klippenstein to work, the union would proceed with the matter to arbitration as soon as possible.

After some wrangling between the parties about who was supposed to do what, Mr. Klippenstein did eventually have his medical examination on February 12, 1991 and,

by letter dated March 15, 1991, he was cleared by CN Medical Services to return to work under restricted conditions. We understand that Mr. Klippenstein returned to work on April 8, 1991 and is currently working for CN Rail at Edmonton.

## II

Now, Mr. Klippenstein has come back to the Board wanting to pursue his complaint against the BLE with a view to having the union compensate him for all lost wages, benefits and his legal costs. In the alternative, Mr. Klippenstein wants the matter referred to an arbitrator to have the question of his lost wages and benefits resolved. What Mr. Klippenstein is relying upon is the union's alleged failure to file a grievance on his behalf with respect to the medical restriction imposed on him by VIA Rail in 1989.

In the circumstances the Board is of the view that it would not be in Mr. Klippenstein's best interests to reconvene the hearing into this complaint, particularly in light of the absence of any evidence in the file that would support a finding that the union had somehow acted in bad faith or was grossly negligent, which are prerequisites for a violation of section 37 of the Code. The fact that the union did not take a grievance on Mr. Klippenstein's behalf when he demanded does not in itself necessarily constitute a breach of the Code.

It is a union's prerogative whether to file a grievance or not and this Board will not intervene unless such a

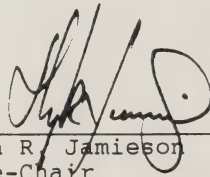
decision is arbitrary or tainted with bad faith, gross negligence, discrimination, hostility or other such unlawful motive. Even if a union is wrong in the opinion of the Board when it decides not to proceed with a grievance, this is not sufficient grounds for the Board's intervention provided the decision was made in good faith. Here, the union did represent Mr. Klippenstein, it did not simply ignore his plight. There is ample material on file to show the union's involvement on Mr. Klippenstein's behalf, particularly in regards to his transfer to CN Rail which Mr. Klippenstein now says he did not ask for. There is also ample material on file to show that the union was acting in good faith and doing what it could in the circumstances. These matters involving medical disability and rehabilitation are extremely sensitive and difficult to deal with. In this case, one only has to glance at the long list of disabled persons on the CN Rail Disability Rehabilitation List who are waiting for alternate work to realize that the union could hardly place Mr. Klippenstein ahead of others who are in a similar predicament.

We can also appreciate Mr. Klippenstein's frustration and his insistence that the BLE did little or nothing for him, particularly as he saw no results until he came to this Board. However, in the absence of any of the unlawful elements which we referred to earlier, and where there is no evidence of gross negligence on the union's part, the question becomes one of union efficiency or, in other words, the quality of representation which is not a matter for consideration under section 37.


It is the absence of something tangible in the written submissions which could support a finding that the BLE had not lived up to its duty of fair representation that convinces the Board that it would be pointless to incur additional expenses for all parties, and particularly for Mr. Klippenstein, by going to a public hearing merely to reconfirm what is already before us. Obviously, without the necessary evidence for a violation of the Code which could trigger the Board's remedial powers under section 99 of the Code, the Board is powerless to do anything further for Mr. Klippenstein.

The Board is therefore using its powers under section 98(2) of the Code to dispose of this complaint without a public hearing and the complaint is dismissed accordingly.

The foregoing is a unanimous decision.



Hugh R. Jamieson  
Vice-Chair



Calvin B. Davis  
Member



Michael Eayrs  
Member

DATED at Ottawa this 30th day of August, 1991.



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## Summary

IAN G. BLACK, COMPLAINANT; CANADIAN  
AIR LINE PILOTS ASSOCIATION,  
RESPONDENT; AND CANADIAN AIRLINES  
INTERNATIONAL LTD., EMPLOYER.

Board File: 745-3494

Decision No.: 890

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## Résumé de Décision

IAN G. BLACK, PLAIGNANT; L'ASSOCIATION  
CANADIENNE DES PILOTES DE LIGNES  
AÉRIENNES, INTIMÉE; ET LIGNES  
AÉRIENNES CANADIEN INTERNATIONAL LTÉE,  
EMPLOYEUR.

Dossier du Conseil: 745-3494

N° de Décision: 890

This is a complaint under section 37  
of the Canada Labour Code (Part I -  
Industrial Relations) wherein Mr. Ian  
G. Black alleges that the Canadian Air  
Line Pilots Association (CALPA) had  
breached its duty of fair  
representation by the manner in which  
it had represented him regarding his  
seniority standing following a merger  
of the seniority of pilots of several  
airlines in 1987.

The complaint was dismissed as being  
without merit and also untimely under  
section 97(2) of the Code. In its  
reasons the Board notes that this is  
yet another case where an ex-Eastern  
Provincial Airways Limited pilot is  
attempting to recover seniority that  
was discounted through the application  
of CALPA's merger policy back in 1987.  
The time limits for this sort of  
complaint have obviously long since  
expired and the Board is instructing  
its staff to fast-track any other such  
complaint to the Board to deal with  
the timeliness issue. This will  
eliminate the unwarranted time and  
expense necessary to investigate the  
merits of these complaints and to  
report to the Board when they are  
clearly matters over which the Board  
no longer has jurisdiction to deal  
with.

Les présents motifs traitent d'une  
plainte fondée sur l'article 37 du  
Code canadien du travail (Partie I -  
Relations du travail) dans laquelle  
M. Ian G. Black allègue que  
l'Association canadienne des pilotes  
de lignes aériennes (ACPLA) a manqué  
à son devoir de représentation juste  
par la façon dont elle l'a représenté  
au sujet de son statut d'ancienneté  
à la suite d'une fusion d'ancienneté  
de pilotes de plusieurs lignes  
aériennes en 1987.

La plainte a été rejetée parce qu'elle  
était sans fondement et qu'elle avait  
été présentée hors délais en vertu du  
paragraphe 97(2) du Code. Dans ses  
motifs, le Conseil prend note qu'il  
s'agit encore une fois d'une affaire  
dans laquelle un ex-pilote de Eastern  
Provincial Airways Limited cherche à  
reprendre l'ancienneté qui lui avait  
été enlevée lorsque la politique de  
fusion de l'ACPLA a été appliquée en  
1987. Les délais pour déposer un  
telle plainte ont évidemment expiré  
depuis longtemps et le Conseil demande  
à son personnel de porter rapidement  
à l'attention du Conseil toute autre  
plainte du genre afin qu'il puisse  
trancher la question de recevabilité.  
Cette procédure évitera qu'il y ait  
du temps passé et de l'argent dépensé  
inutilement pour enquêter sur le bien-  
fondé de ces plaintes et pour les  
faire entendre par le Conseil  
lorsqu'il s'agit clairement de  
questions que le Conseil n'a plus  
compétence de trancher.

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Reasons for decision

Ian G. Black,

*complainant,*

Canadian Air Line Pilots  
Association,

*respondent,*

and

Canadian Airlines International  
Ltd.,

*employer.*

Board File: 745-3494

---

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances: (on record)

Mr. Ian G. Black, for himself;

Mr. John T. Keenan and Ms. Lila Stermer, for Canadian Air Line Pilots Association; and

Mr. Kevin G. Smith, for Canadian Airlines International Ltd.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

This is a complaint under the duty of fair representation provisions contained in section 37 of the Canada Labour Code (Part I - Industrial Relations). Following the filing of the complaint, lengthy mediation efforts have taken place to no avail under the guidance of the Board's Regional Director at Toronto, Mr. Peter T. Suchanek.

A settlement was not arrived at and Mr. Suchanek referred the matter to the Board for its consideration on July 10, 1991 which is the date of his "Investigating Officer's report" to the Board.

On August 14, 1991, this quorum of the Board reviewed the material on file at an "in-camera" session of the Board at Vancouver, B.C., and decided to dispose of the matter without a public hearing pursuant to the Board's powers to do so under section 98(2) of the Code:

*"98.(2) The Board may refuse to hold a public hearing on a complaint made in respect of an alleged contravention of section 37 of non-compliance with section 69 if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part."*

Having analyzed the submissions of the parties as well as the information contained in the investigating officer's report, the panel concluded that the complaint is both without merit and untimely. The following are the Board's reasons for so concluding.

## II

The complainant is presently employed as a First Officer at Canadian Airlines International Ltd. (CAIL). Relevant to this complaint we must go back to March 28, 1983 when the complainant was hired by Eastern Provincial Airways Limited (EPA) as a strike replacement pilot when pilots employed by EPA commenced a legal strike. The Canadian Air Line Pilots Association (CALPA) represented the EPA pilots and certain conduct by both EPA and CALPA during

and at the end of the strike were the subject of findings of this Board which are set out in Eastern Provincial Airways Limited (1983), 54 di 172; 5 CLRBR (NS) 368; and 84 CLLC 16,012 (CLRBR no. 448). One aspect of this decision which we shall refer to as the EPA decision was a return-to-work protocol which governed the return to work of the pilots on the basis of their seniority as of the date the strike commenced. The complainant continued to be employed by EPA after the strike and in fact has been employed continuously through a series of corporate buy-outs and mergers which have resulted in today's entity, CAIL.

Each time there is a corporate takeover or merger, the seniority of the pilots is a major concern and CALPA has worked out a complex system known as the "Merger Policy" for resolving seniority disputes among pilots of affected airlines.

The merger policy comes from section IV of the union's constitution and the process was described briefly in a recent decision of the Board, Brian J. O'Connor, unreported Board decision no. 871 dated May 3, 1991:

- "8. The merger representatives of each group gather data on employment date, seniority date, seniority number, furlough time and leave of absence time for each pilot on their seniority lists, compute each pilot's length of service without crediting furlough time and then arrange for each individual pilot to verify his length of service computation;
9. The merger representatives then negotiate directly in an attempt to compile an integrated list;
10. Where direct negotiations fail, the Merger Policy provides for mediation, at the discretion of the parties or the President;

11. *As a final resort, if mediation and direct negotiations fail to result in an integrated seniority list, the Merger Policy provides for final and binding arbitration;*
12. *The final list must maintain the relative positions of the pilots on their respective current seniority lists;*
13. *The Merger Policy requires that CALPA accept the integrated list within 5 days of its issuance and immediately initiate negotiations with the successor airline to include the list in the agreement between CALPA and the successor airline;"*

(pages 3-4)

This process was used to merge the seniority of pilots when Canadian Pacific Airlines (CP Air) acquired EPA in 1984. When the decision of the arbitration board came down in November 1986, the complainant found himself moving from #104 out of 114 positions on the EPA seniority list to #758 of 767 positions on the integrated CP Air/EPA list. His date of hire remained as March 28, 1983.

The merger policy was triggered again in 1987 after Pacific Western Airlines Ltd. (PWA), CP Air, Nordair and EPA were integrated. Arbitrator Martin Teplitsky dealt with the merger of seniority on this occasion. After the award came down in November and December 1987, the complainant found himself #1271 out of 1279 positions on the merged list. The contributing factor for this was Mr. Teplitsky's ruling that the service of strike breakers cannot be acknowledged in an intra-union seniority dispute. This ruling cost the complainant about 600 days of seniority service. The complainant has been attempting to have the effects of the Teplitsky award on his seniority reversed ever since.

The file is replete with accounts of exchanges between the parties, each expressing their own views about what they had done and said from January 4, 1988 which was the date the complainant first wrote to CALPA about his concerns. To avoid the necessity of reviewing everything that has passed between them we shall simply take some extracts from the investigating officer's report which adequately captures the positions of the parties:

*"As it was stated earlier, the thrust of the subject complaint deals with the complainant's belief that CALPA did not ever deal specifically with the matters giving rise to his letter of January 4, 1988. He contends that Arbitrator Teplitsky breached the CALPA Constitution by ignoring the complainant's date of hire because he was a 'strike breaker' and then placing him in an inequitably lower position on the merged pilot seniority lists. The complainant submits that Teplitsky contravened the provisions in the CALPA Constitution pertaining to mergers, the maintenance of seniority as at the date of hire as a pilot with the company, and, the back to work protocol established in Section (g) of the CLRB's order in Decision No. 448.*

*The complainant submits that CALPA recognized that Arbitrator Teplitsky breached the CALPA Constitution but that CALPA had willingly accepted the Arbitral Award and did nothing to rectify its inequities, specifically as they pertained to his pilot seniority. The complainant submits that CALPA's actions constitute failure to act in 'good faith' as contemplated by Section 37 of the Canada Labour Code. The complainant further submits that he believes CALPA's failure to assist him is in part motivated by the fact that he worked as a strike breaker in 1983."*

(Page 12, I.O.'s Report dated July 10, 1991)

*"CALPA completely denies the complainant's allegations. It specifically submits a number of grounds on which the Canada Labour Relations Board should dismiss the subject matter. These grounds will be dealt with later in the report and include the fact that the complainant's situation involves internal union matters and not matters with respect to his rights under a collective agreement, jurisdiction of the Board to overturn an Arbitral award, judicial review, and the actual timeliness of the complaint."*

(Page 2, I.O.'s Report dated July 10, 1991)

To erase any doubt about the Board fully understanding the thrust of the complaint, we will also reproduce the following portion of the complainant's letter to Mr. Suchanek on December 13, 1990:

*"The specific point to be made here is that my grievance at this time was against the discrimination of the Teplitsky award and my desire was for the trade union which represents me to deal with this injustice. There seems to be a tendency for yourself, and others to drift repeatedly into an area where it is assumed that I am expecting the CLRB to solve the Teplitsky problem.*

*It is my understanding that this is not within the jurisdiction of the board and has therefore never been my expectation.*

*My complaint with the board is that CALPA has never dealt specifically with my grievance nor has it even been mentioned when other opinions were solicited as regarding the prudence of appealing the decision.*

*In short, my grievance was placed on the 'back burner' while other 'more important' matters were being dealt with. It is for this reason that I feel that I have not been represented in 'good faith' and my desire is for the CLRB to direct CALPA to use any and all resources available to correct this discriminatory action and restore my rightful seniority as well as that of the others who were also stripped of their seniority."*

(pages 2-3)

### III

This is not the usual type of complaint under the duty of fair representation provisions where a bargaining agent has refused or neglected to proceed with a grievance. Here, no grievance was ever filed in the normal labour relations sense of the word vis-à-vis a grievance-arbitration procedure under a collective agreement. Notwithstanding the complainant's use of

the term grievance, it is clear that his letter of January 4, 1988 to CALPA was no more than a complaint about the effect of the Teplitsky award on his seniority. The issue becomes how the union handled the complaint.

The complainant says that CALPA, having acknowledged that the Teplitsky award contravened the spirit of CALPA's constitution, had a responsibility to do something about the award either by way of judicial review or simply to take action to correct the alleged inequities caused by the implementation of the award. Dealing first with the question of judicial review, it is clear from the language of section 37 that the duty of fair representation under the Code has been restricted to apply only to employee rights that flow from the collective agreement that is applicable to them. It seems to us that it would be stretching the language of the section far beyond what was intended to suggest that an employee is entitled to judicial review of an arbitrator's decision as a right under a collective agreement. In this complaint, the arbitration decision did not even flow from a collective agreement, but rather from a provision in CALPA's Constitution.

In Brian J. O'Connor, supra, this quorum of the Board responded to a submission by CALPA that its whole merger policy was outside the ambit of this Board's supervisory powers under section 37:

*"With respect, it is difficult for us to see how the method of determining the seniority position on the list can be separated from the seniority rights included in the collective agreement. Notwithstanding that the merger policy is part of the union's constitution, it seems to us that it would naturally follow that the rules to determine seniority cannot be, in themselves, discriminatory nor can the rules be applied in a manner that is arbitrary, discriminatory or in bad faith. All of this*

*surely falls squarely within the duty of fair representation as contemplated by section 37 of the Code."*

(page 7; emphasis added)

There, it was obviously the rules themselves and their application that was being referred to, not judicial review of the arbitration decision that flows from it. This, in our opinion, is clearly outside the Board's jurisdiction under section 37 of the Code.

There is nothing in this complaint going to the rules in CALPA's merger policy being discriminatory in themselves, or, that the rules have been applied in an arbitrary, discriminatory or bad faith manner. At the time of this merger, the complainant's interests were looked after by representatives of the EPA Pilot Group and there are no allegations of wrongdoing by them. (Even if there were, the time limits for filing such complaints have long since expired). There is simply nothing in this area of the complaint that could possibly lead to a conclusion that CALPA had somehow breached its duty of fair representation during this particular implementation of its merger policy.

Before leaving this topic, it would be fair to point out that the union did seek two separate legal opinions which both advised against proceeding with judicial review. CALPA then distributed these opinions with a package of material to its membership to allow them to cast a ballot on the issue before it decided not to proceed. The complainant, as a participant in that process, was perhaps understandably disappointed that the decision did not go his way but we cannot see what else CALPA could have done to ensure a democratic and fair process.

Furthermore, as CALPA pointed out in its submissions, the very group that represented the complainant, the EPA Pilot Group, did initiate judicial review proceedings which were later rejected by the Nova Scotia Court of Appeal. We have nothing to show whether this group specifically raised concerns about Mr. Teplitsky's treatment of strikebreakers but the point by CALPA is well taken. The complainant certainly had the opportunity to intervene in these proceedings.

The complainant's contention that CALPA should have ignored the Teplitsky award and taken unilateral action to restore his seniority is really quite preposterous. The award was final and binding on all of the parties and non-compliance would surely have led to any number of legal consequences for the union. The ripple effect of tampering with the merged list would, in all likelihood, have resulted in complaints to the Board from other members whose seniority positions on the list could have been adversely affected. There was simply nothing that CALPA could do about the concerns of the complainant; it was legally bound by the award and, there is certainly nothing in this aspect of the complaint that constitutes a breach of section 37.

Zeroing in on what the complainant said in his December 13, 1990 submission is his real complaint which is that CALPA never did deal specifically with his so-called grievance. This is really not accurate. Perhaps CALPA did err in that no one actually stood up and said "No" to the complainant but this does not necessarily mean that the substance of his complaint was not dealt with. There is ample evidence on file to show that CALPA addressed the concerns of all of its affected members

about the effects of the Teplitsky award in a collective fashion. The union certainly acknowledged the complainant's letter of January 4, 1988 as indicated on page 8 of the investigating officer's report where an excerpt from Captain R.J. McInnis's letter of January 30, 1988 is reproduced:

*"Thank you for your thought-provoking letter of Jan. 4. I have passed it on to our legal counsel, Mr. Peter Gall, and to the rest of the MEC for further comment and discussion.*

*You have identified several inequities and injustices in the Teplitsky Award. The MEC has included these areas of concern, and others in our direction to our second legal opinion. This legal opinion, as well as an opinion from an arbitrator's perspective will be presented to the CP pilots sometime in late February."*

(emphasis added)

Thereafter, Arbitrator Teplitsky's treatment of EPA strike breakers was included in the package of concerns that CALPA considered when assessing whether to seek judicial review of the award. When the decision came down in the summer of 1988 not to proceed with judicial review proceedings, that was the end of the road for the complainant's avenue for redress through CALPA. There was just nothing the union could do about his seniority standing for all of the reasons we touched upon earlier. The fact that no one appears to have actually set this out for the complainant as an individual does not, in our view, amount to a breach of CALPA's duty of fair representation. At best, this could only be viewed as simple negligence which is not grounds to support a violation of the Code. This was established by the full Board sitting in plenary session in Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRb no. 304):

"...The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. The union election or selection process does not guarantee competence any more than the process does for those selected to act in other democratic institutions such as Parliament or appointees to administrative agencies.

...

In keeping with the approach of labour relations boards in the Unites States, Ontario and British Columbia, we find simple negligence not to be a breach of the duty of fair representation."

(pages 324-325; 131-132; and 14,831;  
emphasis added)

In Dave Mullin (1991), 91 CLLC 16,015 (CLRB no. 852), this quorum of the Board endorsed those sentiments and added:

"...the Board must be cautious to use its supervisory powers over the duty of fair representation to detect and remedy only abuses of exclusive representation authority by bargaining agents. This is the mischief sought to be caught by the legislation; it is not intended to be used to repair perceived defects in the system or to correct apparent injustices. This was clearly what was being said by the full Board in Brenda Haley, supra."

(page 14,214)

There is absolutely nothing in this complaint to show that CALPA abused its exclusive representation authority in the manner in which it dealt with the complainant. It may well be that the complainant feels that he was unjustly treated when his seniority was discounted by Arbitrator Teplitsky but there is nothing that can be done about that through this Board's powers under section 37 of the Code. This complaint against CALPA has no merit and it is dismissed accordingly.

We mentioned at the outset of these reasons that the complaint is also untimely in light of the time limits imposed by section 97(2) of the Code:

*"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."*

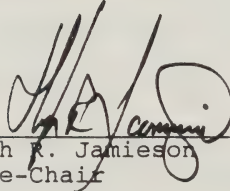
The complainant submitted that it was not until approximately mid-November 1989 that he finally believed that CALPA did not intend to correct the inequity which resulted in his lost seniority. Prior to that he claims that he was under the impression that CALPA was working to amend his seniority standing. In other words, he still held hope from the summer of 1988 until November 1989 that CALPA would change his seniority notwithstanding that the union had decided against judicial review and also that his ex-EPA colleagues had used all of their avenues of redress against the Teplitsky award to no avail. With all due respect, it does not take much labour relations moxy to understand what was going on and that all the doors for redress against the Teplitsky award had been closed. It seems to us that it was not the sudden realization in November 1989 that CALPA was not doing anything for him that prompted this complaint on December 18, 1989, it was the upcoming merger of the CAIL-Wardair pilots. Each time there is a possibility that CALPA's merger policy will be implemented pilots get uneasy about their seniority standing in the face of possible lay-offs and many commence actions such as this complaint attempting to redress perceived inequities in the past. This complaint

is but yet another example of an ex-EPA pilot attempting to challenge the discounting of the EPA service by arbitrations flowing from the merger policy. The bottom line here is the same as in Brian J. O'Connor, supra, who was another ex-EPA pilot trying to retrieve some of his EPA service which he claimed he lost unjustly through inequities in the CPA-EPA merger. The time limits have simply run out. The circumstances giving rise to this complaint occurred in 1987, i.e. the Teplitsky award. CALPA's reaction to that ended in the summer of 1988 when it decided not to seek judicial review. It was then the complainant knew or, in the opinion of the Board he ought to have known, of the circumstances giving rise to this complaint. The 90-day time limit for filing complaints commenced way back then and has long since expired. No amount of communications to CALPA or refusals by CALPA can now re-open these time limits. This complaint was not filed until December 1989. It is untimely.

One observation before closing. The Board has taken the time to respond at length to the merits of this complaint even when it was clearly untimely on its face. This was done mainly because it seems rather unfair to the parties to receive a one-line decision saying that the complaint is untimely after the matter has been in the Board's system for well over a year. It seems to us, however, that it is time for steps to be taken to eliminate the time-consuming and expensive procedures necessary to bring this type of complaint to the stage where it is ready for Board consideration (see Gordon Duncan McCance (1985), 61 di 49; 10 CLRBR (NS) 23; and 85 CLLC 16,042 (CLRBR no. 515) for an overview of how the Board deals with section 37 complaints). This is the second time in recent months the Board has dealt with complaints from

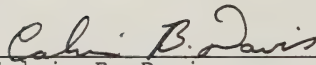
pilots arising from the Teplitzky award and events preceding that award. Both have been found to be untimely. From now on, the Board's staff will be instructed to weed out any other such complaints and to fast-track them to the Board's attention for consideration of the timeliness issue. This will eliminate the unwarranted cost and effort necessary for our staff to fully investigate the merits of these complaints and to complete their reports to the Board.

The foregoing is a unanimous decision of the Board.



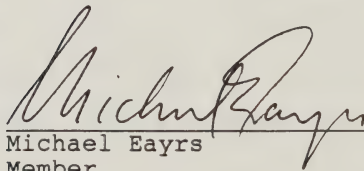
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Hugh R. Jamieson  
Vice-Chair



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Calvin B. Davis  
Member



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Michael Eayrs  
Member

DATED at Ottawa this 30th day of August, 1991.

# information

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## Summary

RICHARD GABORIAULT ET AL.,  
APPLICANTS; TECKSOL INC. AND GILLES  
MINVILLE, RESPONDENTS; AND  
TRANSPORT CANADA AND THE ATTORNEY  
GENERAL OF CANADA, MIS-EN-CAUSE.

Board File: 530-1975

Decision No.: 891

The Board dismisses an application  
for review of a decision rendered  
in Tecksol Inc. (1988), 75 di 130  
(CLRB no. 713) where it had been  
determined that the real employer  
in a complaint of unfair labour  
practice was not Tecksol but rather  
the Transport Department, whose  
activities do not fall under the  
Board's jurisdiction.

The Board dismisses the application  
for review for the following  
reasons:

The Econosult judgment, issued by  
the Supreme Court on March 21,  
1991, on which the applicants based  
their application, has no bearing  
on decision no. 713 in that it only  
determines that Econosult employees  
are not civil servants falling  
under the Public Service Staff  
Relations Board jurisdiction. The  
judgment did not determine however  
that the employees could not be  
employees of a federal government  
department.

Contrary to the situation  
prevailing in Econosult, the Board  
has full jurisdiction to determine  
who is an employee and who is an  
employer and this is what it has  
done, by properly applying its  
policies.

The problem raised by the fact that  
employees are not covered either by  
the Public Service Staff Relations  
Act or by the Canada Labour Code  
requires a legislative solution  
rather than an administrative one.

Ce document n'est pas officiel.  
Seuls les Motifs de décision  
peuvent être utilisés à des fins  
juridiques.

## Résumé de Décision

RICHARD GABORIAULT ET AUTRES,  
REQUÉRANTS, ET TECKSOL INC. ET  
GILLES MINVILLE, INTIMÉS, ET  
TRANSPORTS CANADA ET LE PROCUREUR  
GÉNÉRAL DU CANADA MIS EN CAUSE.

Dossier du Conseil: 530-1975

No de Décision: 891

Dans cette affaire, le Conseil  
rejette une demande de révision  
d'une décision rendue dans Tecksol  
Inc. (1988), 75 di 130 (CCRT n°  
713), où il avait été décidé que  
l'employeur véritable des  
plaignants qui avaient déposé une  
plainte de pratique déloyale  
n'était pas la compagnie Tecksol  
Inc. mais plutôt le ministère des  
Transports (Transports Canada),  
dont les activités ne sont pas  
assujetties à la compétence du  
Conseil.

Les motifs pour lesquels le Conseil  
rejette la demande de révision sont  
les suivants:

L'arrêt Econosult, rendu par la  
Cour suprême le 21 mars dernier,  
sur lequel les requérants fondent  
leur demande, n'a aucune incidence  
sur la décision n° 713 en ce qu'il  
ne fait que décider que les  
employés de Econosult ne sont pas  
des fonctionnaires assujettis à la  
compétence de la Commission des  
relations de travail dans la  
Fonction publique. Il n'a  
toutefois pas déterminé que les  
employés ne peuvent pas être des  
employés d'un Ministère de l'État  
Canadien.

Contrairement à la situation qui  
prévalait dans Econosult, le  
Conseil possède toute la compétence  
nécessaire pour déterminer qui est  
un employé et qui est un employeur  
et c'est ce qu'il a fait en  
appliquant correctement ses  
politiques.

Le problème engendré par le fait  
que des employés ne soient  
assujettis ni à la Loi sur les  
relations du travail dans la  
fonction publique ni au Code  
canadien du travail nécessite une  
solution législative plutôt  
qu'administrative.



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Reasons for decision

Richard Gaboriault et al.,  
*applicants,*  
  
*and*  
  
Tecksol Inc. and  
Gilles Minville,  
  
*respondents,*  
  
*and*  
  
Transport Canada and the  
Attorney General of Canada,  
  
*mis-en-cause.*  
  
Board File: 530-1975

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The Board was composed of Mr. J.F.W. Weatherill, Chairman,  
and Messrs. Thomas M. Eberlee and J. Philippe Morneault,  
Vice-Chairmen.

Counsel of record:

Mr. Jean Barrette, for the applicants;  
Mr. Robert Gagnon, for respondent Tecksol Inc.; and  
Mr. Raymond Piché, for the Attorney General of Canada,  
*mis-en-cause.*

These reasons for decision were written by Mr. J. Philippe  
Morneault, Vice-Chairman.

On June 18, 1991, the Board received an application made  
pursuant to section 18 of the Canada Labour Code (Part I -  
Industrial Relations) to reconsider the Board decision in  
Tecksol Inc. (1988), 75 di 130 (CLRB no. 713), rendered on  
November 3, 1988, and hereinafter referred to as decision  
no. 713.

Decision no. 713 disposed of a complaint filed by Richard  
Gaboriault and others (the applicants) under section 187(1)  
of the Code (Part V - Industrial Relations) (now section

97(1), Part I) alleging violation of section 184(3)(a)(i) (now 94(3)(a)(i)) by respondents Tecksol Inc. and Gilles Minville, technical administrator (P.T.V.s) and an employee of the Department of Transport (Transport Canada) at Mirabel International Airport. Following an initial hearing in that case, the Board dismissed the complaint as it related to Mr. Minville and decided to convene a second hearing that impleaded Transport Canada. Decision no. 713 sets forth the reasons why the Board determined that the real employer of the applicants was not Tecksol Inc., but Transport Canada, and that the latter does not fall within the Board's jurisdiction.

Applications to review and set aside decision no. 713 were made to the Federal Court of Appeal by the Attorney General of Canada on November 22, 1988 (Court file no. A-1145-88) and by the applicants on November 23, 1988 (Court file no. A-1149-88). On October 24, 1989, all parties asked the Federal Court of Appeal to stay these two proceedings until the Supreme Court of Canada rendered its judgment in Canada (Attorney General) v. Public Service Alliance of Canada, no. 21393 (Econosult). This judgment was rendered on March 21, 1991. The two applications to review and set aside are still pending before the Federal Court of Appeal.

After being informed of the judgment in Econosult, supra, the applicants filed the instant application for review on the following grounds:

*"This recent decision of the Supreme Court of Canada establishes that the complainants and all other employees of the alleged employer Tecksol Inc., who are employed in P.T.V. operations at Montréal International Airport (Mirabel) could not lawfully and legally be employees of the Ministry of Transport, nor could they in fact meet the prerequisites established by statute.*

*Consequently, in this case, as was the case in Econosult, your Board did not have jurisdiction to declare that these employees were employees of the Government of Canada who were subject to the legal scheme of labour relations of the federal public service."*

(translation)

In its reply to this present application, the respondent alleges that Econosult, supra, does not mean what the applicants claim it means and that there is therefore no reason to alter decision no. 713.

The mis-en-cause Attorney General of Canada argues in his reply that the Board cannot exercise its power of review because applications to review and set aside decision no. 713 are already before the Federal Court of Appeal. However, the Attorney General agrees with the applicants' position on the merits of the instant application.

This application was referred to this Board panel meeting in camera as a reconsideration panel, in accordance with the Board's review policy. The principal role of a reconsideration panel was described as follows in Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640):

*"Upon receipt of a review application respecting a recent decision, a summit panel [now reconsideration panel] of the Board will determine if and where the application will be referred for review. When an application alleges that the original panel erred in its interpretation of the Code or of a Board policy, the summit may conclude that there is no merit in the claim and may then simply dismiss the matter. Or it may believe that the issues raised are sufficiently substantial to warrant the application being referred to a plenary session for consideration by all members of the Board. A referral does not mean that the summit panel accepts the claims of the applicant; simply that it believes there is cause for review."*

*The practice with respect to a review application that addresses an issue of fact is to refer it back to the original panel for consideration and disposition."*

(pages 188; 235; and 14,267)

The grounds of the application for review filed in the instant case require us to examine the judgment in Econosult, supra, to determine whether in fact it has the meaning it is alleged to have by the applicants. An examination of the reasons for judgment, rendered for the majority of the Supreme Court, by Sopinka, J., reveals that they deal with the absence of jurisdiction in the Public Service Staff Relations Board to determine who is an employee, and that the express definition of the word "employee" contained in the Public Service Staff Relations Act, R.S.C. 1970, c. P-35, s. 2, shows that Parliament clearly intended to determine itself the category of employees over which the Public Service Staff Relations Board would have jurisdiction. In the wake of this judgment, only "employees" who occupy positions established by Treasury Board under the provisions of the Financial Administration Act, R.S.C., 1985, c. F-11, and who were appointed to these positions by the Public Service Commission under the Public Service Employment Act, R.S.C. 1970, c. P-32, apart from the exceptions enumerated in that Act, are considered "employees" subject to the jurisdiction of the Public Service Staff Relations Board.

In its judgment, moreover, the Supreme Court also made a comparison between the jurisdiction of the Public Service Staff Relations Board and this Board's jurisdiction as defined in section 16 of the Canada Labour Code:

*"16. The Board has, in relation to any proceeding before it, power*

...

(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether

(i) a person is an employer or an employee, ..."

It is appropriate here to quote certain provisions of the Canada Labour Code, in particular the following:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(e) aerodromes, aircraft or a line of air transportation,

...

3.(1) In this Part,

...

'employee' means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;

'employer' means

(a) any person who employs one or more employees, and

(b) in respect of a dependent contractor, such person as, in the opinion of the Board, has a relationship with the dependent contractor to such extent that the arrangement that governs the performance of services by the dependent contractor for that person can be the subject of collective bargaining;

...

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

5.(1) This Part applies in respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of the employees of any such corporation, except any such corporation, and the

employees thereof, that the Governor in Council excludes from the operation of this Part.

(2) The Governor in Council may, pursuant to subsection (1), exclude from the operation of this Part only those corporations in respect of which a minister of the Crown, the Treasury Board or the Governor in Council is authorized to establish or to approve some or all of the terms and conditions of employment of persons employed therein.

(3) Where the Governor in Council excludes any corporation from the operation of this Part, the Governor in Council shall, by order, add the name of that corporation to Part I or II of Schedule I to the Public Service Staff Relations Act.

6. Except as provided by section 5, this Part does not apply in respect of employment by Her Majesty in right of Canada."

Consequently, as one can see, unlike the Public Service Staff Relations Board, this Board does have jurisdiction to determine who is an employee and who is an employer.

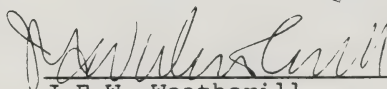
If the judgment in Econosult, supra, did decide anything with respect to the employees affected by decision no. 713, it was simply that they are not "employees" subject to the jurisdiction of the Public Service Staff Relations Board since they do not occupy positions established by Treasury Board. The judgment did not decide that these employees are not employees of Transport Canada.

The Board has established criteria it applies in determining who is an employer within the meaning of the Code (see Nationair (Nolisair International Inc.) (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630)). If a department of the Government of Canada establishes policies by virtue of which it becomes the employer of employees who are subject neither to the Public Service Staff Relations Act, in the wake of the judgment in Econosult, supra, nor to the Canada Labour Code, the Board is powerless to do anything about it and any problem created by this situation requires a legislative and not an administrative solution.

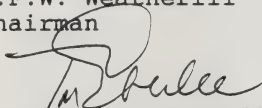
An examination of the impugned decision no. 713 reveals that the initial Board panel properly applied the criteria established by the Board for determining who was the employer of the employees in question. In order to refer the matter to a plenary session of the Board, this panel must be satisfied that the existing criteria the Board applies in determining who is the employer need to be amended. We are not persuaded that such is the case.

In these circumstances, reconsideration by the Board of decision no. 713 is not deemed to be the best possible solution. From the standpoint of sound labour relations, it is therefore preferable that the matter not be held up any longer before the Board.

For all the above reasons, the application is dismissed.



J.F.W. Weatherill  
Chairman



Thomas M. Eberlee  
Vice-Chairman



J. Philippe Morneault  
Vice-Chairman

ISSUED at Ottawa, this 30th day of August 1991.

CCRT/CLRB - 891



# information

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## SUMMARY

## RÉSUMÉ

CANADIAN PACIFIC LIMITED, APPLICANT, AND NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) ET AL., RESPONDENTS

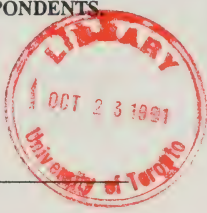
LA COMPAGNIE DES CHEMINS DE FER PACIFIQUE DU CANADA, REQUÉRANTE, LE SYNDICAT NATIONAL DES TRAVAILLEURS ET TRAVAILLEUSES DE L'AUTOMOBILE, DE L'AÉROSPATIALE ET DE L'OUTILLAGE AGRICOLE DU CANADA (TCA - CANADA) ET AL., DIVERS INTERVENANTS.

Board File: 530-1848

Dossiers du Conseil : 530-1848

Decision No.: 892

Décision n° : 892



In this decision the Board dismissed a motion brought by two of the Respondent trade unions in which they asked the Board to terminate proceedings in an application by the employer CPR for review of the seven "craft" bargaining units of employees in its main and line shops.

Dans cette décision, le Conseil rejette la requête présentée par deux des syndicats requérants dans le but de mettre fin à la procédure de révision entamée à la demande de l'employeur à l'égard des sept syndicats de métiers oeuvrant dans ses ateliers principaux et secondaires.

The employer had presented its evidence in chief in support of its application when the respondents IAM and IBEW brought their motion to terminate the proceedings. The two trade unions argued that CPR had not made out a prima facie case which the respondents should be required to answer. The applicant CPR and the respondent trade union CAW opposed the motion.

L'employeur avait présenté sa preuve sur examen en chef à l'appui de sa demande lorsque les syndicats requérants AIM et FIDE ont déposé une requête visant à mettre fin à la procédure de révision. Selon les deux syndicats, l'employeur n'a pas réussi à démontrer le bien-fondé de sa demande et par conséquent, les requérants ne devraient pas avoir à y répondre. L'employeur et le TCA se sont opposés à la requête.

The Board acknowledged that not all of the evidence called by CPR supported its application. The Board pointed out, however, that it appeared that certain "craft rules" set out in the various applicable collective agreements led to some inflexibility with respect to work assignments. The question of whether the existing multi-unit bargaining structure militates against fruitful negotiation on that topic is a proper matter, amongst others, to be considered in a review of the appropriateness of a bargaining unit or units.

Le Conseil reconnaît que certains éléments de la preuve de l'employeur ne peuvent être invoqués à l'appui de la révision demandée. Il signale toutefois que certaines règles énoncées dans les conventions collectives semblent entraver la répartition du travail. La question de savoir si la multiplicité des unités de négociation nuit à la négociation de cette question doit en revanche être prise en considération lorsqu'on examine l'habileté à négocier collectivement.

In dismissing the motion the Board also referred to various social, economic, organizational and technological changes which have revolutionized the work, the workplace, the workers themselves and their institutions since the workers organized along craft lines in the latter part of the nineteenth century. Much of the evidence related to these matters was not contained in the employer's evidence but was either public knowledge or was set out in the report of the investigating officer.

Le Conseil fait allusion dans sa décision aux profondes transformations d'ordre social, économique, organisationnel et technologique qui ont marqué le travail, les travailleurs, leur lieu de travail et leurs institutions depuis que les syndicats de métier ont vu le jour à la fin du dix-neuvième siècle. Bon nombre d'arguments à cet égard ne proviennent pas de la preuve de l'employeur mais plutôt du rapport de l'agent enquêteur ou d'information du domaine public.

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Reasons for decision

Canadian Pacific Limited,  
*applicant,*  
*and*

National Automobile, Aerospace  
and Agricultural Implement  
Workers Union of Canada et al.,  
*respondents.*

Board File: 530-1848

The Board was composed of Mr. J.F.W. Weatherill,  
Chairman, and Ms. Ginette Gosselin and Mr. Michael Eayrs.

Appearances:

Mr. M. Shannon, for the Canadian Pacific Limited (CP);  
Mr. S. Waller for the Canadian Automobile Workers (CAW),  
respondent;

Mr. J. Shields for the International Association of  
Machinists and Aerospace Workers (IAM), respondent;

Mr. F. Côté for the International Brotherhood of  
Electrical Workers (IBEW), respondent;

Mr. M. Church for the United Association of Journeymen  
and Apprentices of the Plumbing and Pipe Fitting Industry  
of the United States and Canada (UA), International  
Brotherhood of Boilermakers, Iron Ship Builders,  
Blacksmiths, Forgers and Helpers (BBF), Sheet Metal  
Workers' International Association (SMW) and  
International Brotherhood of Firemen and Oilers (IBFO);  
Mr. A. Rosner, intervenor.

These reasons for decision were written by Mr. J.F.W.  
Weatherill, Chairman.

In a ruling given at the hearing of this matter on July  
19, 1991, the Board directed counsel to submit written  
arguments in respect of motion in the nature of a

"nonsuit" brought by the respondents IAM and IBEW. Arguments, replies and responses were then made by all parties in accordance with a schedule which had been agreed upon.

It is contended by IAM and IBEW that the applicant CPR, whose evidence in chief has now been heard, has not made out a case which the respondents should be required to answer, and that these proceedings should be terminated at this point. The other respondents, except the CAW, support the position of IAM and IBEW. The applicant CPR and the respondent CAW oppose the motion.

What is sought by the applicant in this section 18 application is the review of the seven "craft" bargaining units of employees in its main and line shops. The bulk of the company's employees in its shops are employed in one or another of these craft units. (For the purposes of this application, the unit of employees represented by the respondent International Brotherhood of Firemen and Oilers is a craft unit, although most of its members are classified as Labourers and do not normally exercise craft skills). The applicant, which in this respect is supported by the respondent CAW, seeks the amalgamation of these bargaining units into one. A possible result could be a single unit of shopcraft (including IBFO) employees, along "industrial" lines, although such unit would not, strictly speaking, be an industrial bargaining unit. It would, nevertheless, be a unit of the vast majority of employees working in the applicant company's shops.

Much of the argument in the motion now before us relates to the question whether or not the company had made out a "prima facie" case for review, having regard to the Board's previous decisions in cases of this general nature, and in particular to the Board's decision in Canadian National Railway Company et al. (1985), 64 di 70 (CLRB no. 556) which involved these and other parties, and as a result of which the bargaining units now in question (as well as others, involving the other major railway), were established. That case, as a differently constituted panel of the Board explained in Canadian National Railway Company (1991), as yet unreported CLRB decision no. 845, which dealt with certain preliminary motions in Board Files 530-1850 and 530-1851 (the "CN cases"), was concerned in essence with the question of the viability of the Canadian Council of Shopcraft and Allied Workers as bargaining agent. The Council, although a "trade union" within the meaning of the Code and the single bargaining agent for the employees who would come within the bargaining unit sought in this case was, of course, a council of trade unions. The employees were in fact represented for many purposes of collective agreement administration by the individual craft unions of which they were members. The "single bargaining unit", with respect to which the position of the employer is now said to be inconsistent, was a quite different matter from the single bargaining unit which the employer, and the respondent CAW, now contemplate. As the Board said in its earlier decision (which this panel of the Board adopted in Canadian Pacific Limited (1991), as yet unreported CLRB decision no. 866) the question now before it is not - certainly not in substance - the same

as the question which was before the Board in CLRB no. 556.

In the instant case, there is now considerable evidence before us, both through examination in chief and through lengthy cross-examination, with respect to the experience of the parties in collective bargaining and collective agreement administration in recent years. Not all of this evidence lends very strong support to the employer's claim that the present set of bargaining units "does not work". The threat of "multiple strikes", for example, seems to us, as a practical matter, to be a remote one, and the matter of "jurisdictional disputes" has not, to any significant degree, presented itself in the form of disputes between unions which have led to stoppages of work.

It certainly does appear at this stage of the proceedings that the "craft rules" set out in the various collective agreements lead to a certain inflexibility with respect to work assignments. The limited relaxation of such rules which arbitration awards or the parties' own negotiations have provided would appear only partially to answer the company's apparent needs in that regard. We have no doubt at all that there are many tasks for which specialized craft skills, and in many cases accreditation as a journeyman, will continue to be required for the foreseeable future. Rules with respect to work assignment are, as all parties have recognized, matters for negotiations between the parties. It can, however, be argued that the present multi-unit bargaining structure militates against fruitful negotiation on that topic, and that would be one of a number of matters

proper to be considered in the determination of an appropriate bargaining unit or units on a review such as this.


Although we have, for convenience, described the present motion as "in the nature of a nonsuit", that is only a roughly analogous way of describing it. The question should, we think, be put this way: having heard the employer's case, and the CAW having elected not to call evidence in chief, do we consider that it is proper to continue these hearings, and to contemplate the possibility of a different bargaining unit structure for these employees? Our answer to that question is yes.


We are of the view that it is appropriate to consider a change in the bargaining unit structure in the company's shops because while this structure has been altered considerably over the years, it has always retained its fundamental "craft" character. Employees, naturally enough, organized on craft lines in the latter nineteenth century, long before the current notion of "bargaining unit" had been formulated. Since that time there have been social, economic, organizational and technological changes which have revolutionized not only work and the workplace but also the workers themselves and their institutions. Of course, recognition that such changes have occurred does not require the conclusion that there should be any change in any particular grouping of employees or, as is the case here, in any particular bargaining unit. The recognition of fundamental contextual change, however, together with a consideration of the company's view of its bargaining and administration difficulties and, more importantly, those

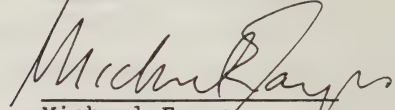
of the trade union representing the largest number of the employees concerned, lead us to conclude that it is proper at least to consider the appropriateness of the present bargaining units.

Much of the evidence which we consider to have the greatest bearing on this matter is either public knowledge or is set out in the Officer's report. While precise factual determinations may be necessary for matters such as exclusions, problems of that sort do not arise in the present case. The determinations the Board will have to make will, we think, be helped more by pertinent argument, although we recognize that the respondents may wish to answer some of the evidence of fact which has been given.

For the foregoing reasons, the motion before us is dismissed. Hearings in this matter will continue in accordance with the schedule of which the parties have been advised.

  
J.F.W. Weatherill  
Chairman

  
Ginette Gosselin  
Member of the Board

  
Michael Eayrs  
Member of the Board

DATED AT OTTAWA, this 9<sup>th</sup> day of September, 1991.

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## Summary

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, APPLICANT;  
CANADIAN ASSOCIATION OF COMMUNICATIONS  
AND ALLIED WORKERS, BARGAINING AGENT/  
RESPONDENT; AND UNITEL COMMUNICATIONS  
INC., EMPLOYER.

Board File: 580-117

Decision No.: 893



## Résumé de Décision

FRATERNITÉ INTERNATIONALE DES OUVRIERS  
EN ÉLECTRICITÉ, REQUÉRANTE;  
ASSOCIATION CANADIENNE DES EMPLOYÉS  
DE COMMUNICATIONS ET TRAVAILLEURS  
CONNEXES, AGENT NÉGOCIATEUR ET PARTIE  
INTIMÉE; ET UNITEL COMMUNICATIONS  
INC., EMPLOYEUR

Dossier du Conseil: 580-117

N° de Décision: 893

These reasons deal with an application under the trade union successor provisions in section 43 of the Canada Labour Code (Part I - Industrial Relations) wherein the International Brotherhood of Electrical Workers (IBEW) claimed that a merger had taken place between it and the Canadian Association of Communications and Allied Workers (CACAW) in relation to a bargaining unit of employees at Unitel Communications Inc. The IBEW asked the Board to issue a declaration that the alleged merger had occurred and to issue orders setting out what rights and privileges the IBEW had inherited from CACAW.

CACAW denied that a merger had taken place between the two unions.

The application was dismissed. In its reasons the Board discusses its jurisdiction under section 43 and found that in the circumstances where there was no consensus between the parties about the merger it was not advisable to proceed with the application. The Board pointed out that section 43 contemplates that a merger is a fait accompli and that the Board's primary jurisdiction is restricted to questions arising as to what rights or privileges have been inherited.

Les présents motifs portent sur une demande présentée en vertu des dispositions de l'article 43 du Code canadien du travail (Partie I - Relations du travail) concernant les droits de successeur. Dans cette affaire, la Fraternité internationale des ouvriers en électricité (FIOE) soutient qu'il y a eu fusion entre celle-ci et l'Association canadienne des employés de communications et travailleurs connexes (ACECTC) à l'égard d'une unité d'employés de Unitel Communications Inc. La FIOE s'est adressée au Conseil pour lui demander de déclarer que la fusion avait eu lieu et de rendre des ordonnances énonçant les droits et privilèges que lui cédait l'ACECTC.

L'ACECTC nie qu'une fusion ait eu lieu.

La demande est rejetée. Dans ces motifs, le Conseil s'est penché sur les pouvoirs que lui confère l'article 43 et en est arrivé à la conclusion qu'il était préférable de ne pas donner suite à la demande en l'absence de consensus entre les parties. Le Conseil signale qu'aux termes de l'article 43, une fusion est un fait accompli, et la compétence du Conseil se limite au règlement de questions concernant les droits et privilèges qui ont été cédés.

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Reasons for decision

International Brotherhood of  
Electrical Workers,

*applicant,*

Canadian Association of  
Communications and Allied  
Workers,

*bargaining agent/respondent,*

and

Unitel Communications Inc.,  
*employer.*

Board File: 580-117

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The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Ms. Sandra I. Banister, for the International Brotherhood of Electrical Workers; and

Mr. Pierre Grenier, for the Canadian Association of Communications & Allied Workers.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

This is an application under the trade union successor rights provisions in section 43 of the Canada Labour Code (Part I - Industrial Relations). The application, which was filed with the Board on February 18, 1991 by the International Brotherhood of Electrical Workers

(IBEW), seeks a declaration that a merger has occurred between the IBEW and the Canadian Association of Communications and Allied Workers (CACAW) in relation to a bargaining unit of employees at Unitel Communications Inc. (Unitel). The IBEW further sought orders setting out what rights, privileges and duties that it had inherited from CACAW as a result of the merger.

CACAW denied that a merger had taken place and submitted that the Board has no jurisdiction to make the declaration sought by the IBEW.

The Board heard the parties on this question of the Board's jurisdiction under section 43 of the Code at Vancouver on August 15, 1991.

## II

The relevant facts leading up to the IBEW's application can be capsulized as follows.

CACAW is the certified bargaining agent for a group of technical and non-technical employees at Unitel which is the former CNCP Telecommunications. In 1989 a movement developed within CACAW concerning the future of the union and questions were raised as to whether CACAW should merge with another union or restructure its own internal organization. Following some groundwork by specially appointed committees a referendum ballot was conducted amongst the union's members in September, 1990. The result of this ballot disclosed that an

overwhelming majority of the union's members who voted preferred to merge with another union rather than restructure CACAW and, in response to a second question on the ballot, a majority of those voting indicated a desire to merge with the IBEW as opposed to the Canadian Union of Public Employees (CUPE) whose name also appeared on the ballot.

According to the IBEW, a Merger Agreement which had been negotiated with CACAW prior to the balloting should have taken effect when the outcome of the referendum ballot clearly favoured a merger with the IBEW. In anticipation of that result the IBEW said that it had already chartered a new local union and had commenced the process of establishing by-laws and to appoint a slate of interim officers.

However, CACAW did not accept that first referendum ballot as a binding decision to merge with the IBEW and it denies that any Merger Agreement was ever entered into and signed with the IBEW. CACAW went on to conduct a second ballot in December 1990 which resulted in a slim majority vote (10 or 11 ballots) in favour of restructuring CACAW as opposed to merging with the IBEW. CACAW's National Chairperson relied upon the outcome of this second ballot to announce that CACAW's restructure was the stated wish of the membership and immediate steps were taken to hold a special convention in May 1991 to initiate the restructure of CACAW.

The IBEW alleged certain irregularities in the voting and counting procedures in the second ballot and suggested that the whole exercise was invalid because of some time restrictions stipulated by a CACAW

Convention Resolution. The IBEW put two propositions to the Board; first, it proposed that the Board declare that a merger had occurred as a result of the first referendum ballot and issue the necessary declaration and orders based on what transpired up to that point in time. In the alternative, and without prejudice to that position, the IBEW said that it would be prepared to let the affected employees decide their own fate through a Board supervised vote. CACAW is opposed to such a vote.

### III

Section 43 of the Code provides:

"43. (1) Where, by reason of a merger or amalgamation of trade unions or a transfer of jurisdiction among trade unions, a trade union succeeds another trade union that, at the time of the merger, amalgamation or transfer of jurisdiction, is a bargaining agent, the successor shall be deemed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise.

(2) Where, on a merger or amalgamation of trade unions or a transfer of jurisdiction among trade unions, any question arises concerning the rights, privileges and duties of a trade union under this Part or under a collective agreement in respect of a bargaining unit or an employee therein, the Board, on application to it by a trade union affected by the merger, amalgamation or transfer of jurisdiction, shall determine what rights, privileges and duties have been acquired or are retained.

(3) Before determining, pursuant to subsection (2), what rights, privileges and duties of a trade union have been acquired or are retained, the Board may make such inquiry or direct that such representation votes be taken as it considers necessary."

(Emphasis added)

CACAW argued that the very wording of section 43 requires a merger or amalgamation of trade unions or, a transfer of jurisdiction among trade unions to be a fait accompli before the provisions of section 43 are triggered. The union said that the Board's powers are then restricted to dealing with questions of successor rights arising from such a merger, amalgamation or transfer of jurisdiction. CACAW pointed out the differences between the wording of section 43 and the sale of the business successor provisions under sections 44, 45 and 46 of the Code where the Board is clearly authorized to deal with the question of whether a sale of business has occurred and who the purchaser is:

*"46. Where any question arises under section 44 or 45 as to whether or not a business has been sold or as to the identity of the purchaser of a business, the Board shall determine the question."*

Counsel for CACAW also took the Board on a comparison tour of the relevant legislation in all other jurisdictions in Canada. This exercise highlighted the statutory language differences between section 43 of the Code and that used in some jurisdictions where other Boards do have powers to make declarations of mergers as a matter of their primary jurisdiction.

Counsel for the IBEW submitted that there is ample authority in the Code for the Board to resolve this pressing labour relations dispute. Relying on a previous decision of this Board in Canadian National Railway Company, Telecommunications Department (1980),

40 di 136; [1980] 3 Can LRBR 140 (CLRB no. 248), counsel suggested that the Board supplement its authority under section 43 with its general powers contained in section 21 of the Code (previously section 121). In that case, the Board intervened in a situation where a trade union that had inherited bargaining rights as a result of a merger announced that it no longer wished to represent the affected employees. There, the Board conducted a representation vote to ascertain which union the affected employees wished to have represent them. At that time the Board said:

*"... The normal circumstances of a transfer of union jurisdiction or a successorship under section 143 (now section 43) occur where there is a clearly expressed voluntary agreement between unions. But the world of industrial relations, fraught with human conflict, often encounters the abnormal circumstances. For this reason Parliament has equipped the Board with the authority to fulfill its intent in unusual as well as normal circumstances. It authorized the Board under section 118(p) (now section 16(p)) 'to decide for all purposes of this Part any question that may arise in the proceeding...' including whether '(vii) any person or organization is a party to or bound by a collective agreement'. To reinforce this omnibus and incidental authority of the Board, section 121 (now section 21) was enacted."*

(pages 144-145; and 147)

The Board went on to quote section 121 of the Code which is now section 21:

*"21. The Board shall exercise such powers and perform such duties as are conferred or imposed on it by this Part, or as may be incidental to the attainment of the objects of this Part, including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board."*

Since then, however, it has become clear that section 21 does not confer autonomous powers on the Board to remedy situations for which there are specific powers prescribed elsewhere in the Code such as is the case here in section 43 (see Re Syndicat des Employés de Production du Québec et de l'Acadie and Canada Labour Relations Board et al. [1984], 2 S.C.R. 412; 14 D.L.R. (4th) 457, 55 N.R. 321; and 84 CLLC 14,069, S.C.C.). Consequently, section 21 of the Code is of little or no assistance for the IBEW in these circumstances. We should also point out that in the Canadian National Railway Company, Telecommunications Department, supra situation, the Board also had before it an application under the reconsideration provisions in the then section 119 of the Code (now section 18) which broadened the Board's authority beyond section 143 (now section 43) to deal with that particular unique circumstance. There, a merger had taken place albeit some time before, where the Board had issued an order setting out what privileges a trade union had inherited. It was that order the Board was being asked to reconsider and vary.

A further argument by the IBEW that the Board could also use its powers under section 16(p)(vii) to determine that the IBEW has, by way of successor rights, become a party to the CACAW-Unitel collective agreement, must also fail. Section 16(p)(vii) provides:

*"16. The Board has, in relation to any proceeding before it, power*

*...*

*(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether*

...

*(vii) any person or organization is a party to or bound by a collective agreement,"*

Section 16 of the Code is obviously a declaration of the Board's powers at large but, like section 21, they cannot be taken as separate and distinct authority to do things not otherwise provided for in the Code. If the Board does not have the jurisdiction under section 43 to declare that unions have merged, in our respectful opinion that power cannot be found in section 16. There is no doubt that there are circumstances where the Board would use its section 16(p)(vii) powers incidentally to an application under section 43 where genuine questions may arise as to who is bound by a collective agreement but we cannot see our way to use section 16 in these circumstances to get to the issue of whether a merger is a fait accompli.

It seems to us that Parliament intentionally left the matter of mergers, amalgamations and transfers of jurisdiction among trade unions as private contract considerations between the parties involved. These are internal union matters in which the Board cannot and in our respectful opinion ought not to interfere. We agree with counsel for CACAW that section 43 as it is presently worded deems that successor rights have been acquired and that the Board's jurisdiction has been restricted to questions about what these rights consist of. It goes without saying that the Board may, in a preliminary way, look to the circumstances to confirm that the prerequisite of a merger, amalgamation or a transfer of jurisdiction have occurred, however, such

a decision would not be protected by the Board's privative clause in the event of judicial review in that it is outside of the Board's primary jurisdiction (see U.E.S. Local 298 v. Bibeault [1988] 1 S.C.R. 1048).

If Parliament did not intend the Board to meddle in these internal union affairs, why then the Board's powers to make inquiries and to hold votes under section 43(3)? The obvious answer is that the legislators foresaw the need for these tools to ensure smooth transitional periods and continuity of collective agreement administration following mergers, amalgamations or transfers of jurisdiction among trade unions which are purely voluntary affairs. In the normal course of these transactions trade unions do consult their members and they attempt to anticipate and resolve all of the issues and problems which could arise. However, bona fide questions can arise after the fact about the effect and reach of the merger, for example, which trade union now represents a particular segment of a bargaining unit or, if it is appropriate for employees doing certain work to be included in the same bargaining unit with others who do not appear to have the same community of interest. Also, as was mentioned earlier, questions can arise as to who is affected by a particular collective agreement or if a collective agreement is still in full force and effect. The Board can deal with all such issues under its specific powers under section 43(3) prior to issuing the necessary orders confirming who now represents who and where.

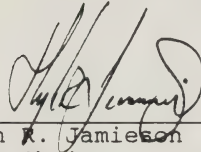
There is also the question of the wishes of the employees which goes to the underpinnings of the Code. As we said, trade unions do normally consult with their members before taking steps to merge with other trade unions or to transfer all or a part of their jurisdiction to another union. As a safeguard to ensure that the fundamental freedom of selecting a trade union of the employees' choice has been respected, the Board requires as a matter of policy that all applications under section 43 of the Code are supported by evidence showing that affected members have been consulted and that a majority have expressed approval for representation by the new or merged bargaining agent. Section 43(3) provides a means for the Board to confirm such evidence should the need arise.

In the circumstances before us here, we do not get as far as the wishes of the affected employees. In the absence of a consensus between the parties about the alleged merger it is our respectful opinion that it is not advisable to embark upon an inquiry into whether a merger has occurred. The end result of such an inquiry could be tantamount to this Board forcing a merger of these two trade unions. This is not what was contemplated by section 43 of the Code.

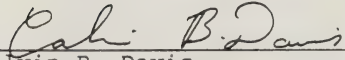
If, as the results of the referendum ballots taken internally by CACAW indicate, there are members who are disenchanted with CACAW's representation there are other avenues for redress under the Code. If the IBEW has the support of the majority of these employees as it

claims, it can file an application for certification at the appropriate time or, the employees themselves can seek to revoke CACAW's bargaining rights. The IBEW also has, of course, access to the civil courts if it believes that CACAW did not live up to the alleged merger agreement.

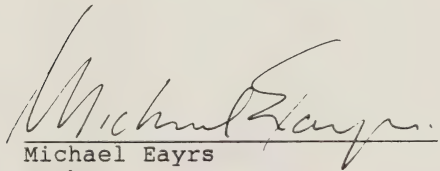
The application is dismissed.



Hugh R. Jamieson  
Vice-Chair



Calvin B. Davis  
Member



Michael Eayrs  
Member

DATED at Ottawa this 20th day of September, 1991.



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## Summary

ADITYA N. VARMA, COMPLAINANT; CANADIAN  
UNION OF POSTAL WORKERS, RESPONDENT;  
AND CANADA POST CORPORATION, EMPLOYER.

Board File: 745-3908

Decision No.: 894

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## Résumé de Décision

ADITYA N. VARMA, PLAIGNANT; SYNDICAT  
DES POSTIERS DU CANADA, INTIMÉ; ET  
SOCIÉTÉ CANADIENNE DES POSTES,  
EMPLOYEUR.

Dossier du Conseil: 745-3908

N° de Décision: 894

These reasons deal with a complaint  
under the duty of fair representation  
provisions in section 37 of the Canada  
Labour Code (Part I - Industrial  
Relations) in which the complainant  
alleges that the union had violated  
the Code by refusing to seek judicial  
review of an arbitrator's decision  
regarding a dismissal grievance.

The complaint was dismissed. In its  
reasons the Board discusses the scope  
of the duty of fair representation  
under the Code and concludes that such  
duty can only apply to situations  
under the Code where a union has  
exclusive representation powers. The  
Board found that judicial review  
proceedings in these circumstances do  
not fall within the ambit of section  
37 of the Code.

Il s'agit d'une plainte déposée en  
vertu des dispositions de l'article  
37 du Code canadien du travail (Partie  
I - Relations du travail) sur le  
devoir de représentation juste. Le  
plaignant allègue que le syndicat a  
enfreint le Code en refusant de  
demander la révision judiciaire d'une  
sentence arbitrale concernant un grief  
de congédiement.

La demande est rejetée. Dans ces  
motifs, le Conseil s'est penché sur  
la portée du devoir de représentation  
juste prévu par le Code. Il conclut  
que ce devoir ne s'applique que  
lorsqu'un syndicat détient des  
pouvoirs exclusifs de représentation.  
Le Conseil juge que la révision  
judiciaire en l'instance n'entre pas  
dans le cadre de l'article 37 du Code.



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Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Aditya N. Varma  
*complainant,*  
Canadian Union of Postal  
Workers,  
*respondent,*  
and  
Canada Post Corporation,  
*employer.*  
Board File: 745-3908

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eaysr, Members.

Appearances:

Mr. Laron Paul Hopkins, for Aditya N. Varma;  
Messrs. James K.A. Hayes and Michael Blazer, for the Canadian Union of Postal Workers; and  
Mr. Ian Szlazak (on record) for Canada Post Corporation.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

On April 15, 1991 Mr. Aditya Varma filed a complaint against the Canadian Union of Postal Workers (CUPW or the union) under the duty of fair representation provisions contained in section 37 of the Canada Labour Code (Part I - Industrial Relations). The substance of the complaint went to a refusal by CUPW to seek judicial review of an arbitration award concerning Mr. Varma's dismissal from his employment at Canada Post Corporation (CPC or the employer).

On September 5, 1991 the Board heard submissions on behalf of Mr. Varma and by CUPW on two preliminary matters which had been raised by the Board as jurisdictional issues affecting the Board's ability to deal with the complaint. These issues were: the timeliness of the complaint in light of the 90-day time limit prescribed by section 97(2) of the Code, and whether judicial review of an arbitrator's decision is a matter covered by the statutory duty of fair representation in the Code.

## II

The fundamental facts are not in dispute. Mr. Varma was a long-term employee with CPC and was discharged from his employment on December 16, 1988. Following an arbitration hearing before Mr. Martin Teplitsky, Q.C., which took place during July and August, 1990, Mr. Varma was awarded compensation but the arbitrator declined to reinstate him in his employment. CUPW turned down a request by Mr. Varma to seek judicial review of the arbitrator's decision. Mr. Varma then commenced his own action in the Ontario Provincial Court under the Judicial Review Procedure Act, R.S.O. 1980, c.224. In response to this action CPC brought a motion to, amongst other things, dismiss the application on the grounds that Mr. Varma had no legal standing to bring the application for judicial review.

CPC's motion was heard by Madame Justice Karen M. Weiler on April 8, 1991 who suggested that the question of the

adequacy of CUPW's representation of Mr. Varma should first be resolved under section 37 of the Code:

*"...The question of whether the union has a duty to represent Mr. Varma has not been resolved. Mr. Varma's attempt to obtain judicial review indirectly calls into question the adequacy of his representation by the union because it refuses to take the case as far as he would like to. This issue should first be resolved by referring the matter under s.37 of the Canada Labour Relations Code. The motion to dismiss Mr. Varma's application is therefore allowed without prejudice to Mr. Varma to reapply if it is deemed appropriate in the future."*

(Ontario Court of Justice, Divisional Court  
file no. 977/90 at pages 2-3)

As we said earlier, Mr. Varma then brought his complaint to this Board on April 15, 1991 and, if there was any doubt before the Court about what Mr. Varma was complaining about vis-à-vis the representation by CUPW, it was certainly cleared up when the parties appeared before this Board at Toronto on September 5, 1991. Counsel for Mr. Varma was explicit. There is no complaint against CUPW as to how the union represented him before the arbitrator. As for the arbitration process, Mr. Varma's complaint is directed at alleged misconduct by the arbitrator. This is the sole basis for his quest for judicial review. Mr. Varma's complaint against CUPW goes to the union's refusal to seek judicial review as well as the union's conduct in what Mr. Varma sees as actions designed to thwart his personal efforts to obtain judicial review at his own expense.

Counsel for Mr. Varma submitted that the union's duty of fair representation goes beyond the arbitration process and that the union's handling of Mr. Varma's

complaints about the arbitrator's conduct is subject to the same critical review by the Board as it is prior to and during arbitration. In short, it was Mr. Varma's position that CUPW's representation must at all times be in accordance with the guidelines set out by the Supreme Court of Canada in Canadian Merchant Service Guild v. Gagnon et al. (1984), CLLC 14,043:

"1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

...

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

(page 12,188; emphasis added)

We have not reproduced paragraphs 2, 3 and 4 as they relate to a union's discretion not to proceed to arbitration with a grievance which is not at issue here.

CUPW argued that judicial review proceedings are beyond the scope of the statutory duty of fair representation under section 37 of the Code. Counsel for CUPW pointed out that there is nothing in the relevant collective agreement between the union and CPC that makes judicial review a right flowing from the agreement. Counsel for CUPW also directed us to a previous decision of this Board where judicial review was found to be outside the Board's jurisdiction under section 37 of the Code:

*"In the Board's judgment, a refusal or failure to seek judicial review is not of itself a violation of section 136.1 (now section 37) in a circumstance such as this. The section specifies that the duty of fair representation*

applies to persons 'with respect to their rights under the collective agreement that is applicable to them'. There is no evidence before the Board that the collective agreement between CALPA and Air Canada at any time material to these proceedings gave anybody the right to have an arbitration decision affecting him or her taken to the Court for judicial review. Mr. Newell thus had no right under section 136.1 to have the arbitrator's decision 'appealed'. as he put it.

The Board is supported in this view, to some extent, by the decision of the Ontario Labour Relations Board in Betty Lavoie, [1981] 3 Can LRBR 431, where the board found the union was not obligated under the equivalent Ontario legislation to finance the complainant's civil action against an employer for dismissal. A similar case was decided by the British Columbia Labour Relations Board in Charles Morgan, [1980] 1 Can LRBR 441, where the board determined that a union did not fail in its duty when it did not represent a dismissed person at a coroner's inquest. The B.C. board stated that when the B.C. legislation speaks of 'representation', 'it must be taken to mean representation in the negotiation or administration of collective agreements'. (pages 459-460). It is relevant to note that the language of neither the Ontario nor the British Columbia legislation restricts the duty of fair representation to 'rights under the collective agreement' as does the Canada Labour Code. This factor, we believe, serves to firm up our view of the scope of section 136.1 in this regard. In any event, we think it probable that Mr. Newell himself had sufficient standing in respect of the arbitration decision affecting him to challenge it in the court by way of the appropriate proceeding, had he so wished. We have no power to order that that be done."

(Gordon Newell (1987), 69 di 119 at page 128; (CLRB no. 623))

### III

The statutory duty of fair representation appeared in the Code in 1978 under the then section 136.1:

"136.1 Where a trade union is the bargaining agent for a bargaining unit, the trade union and every representative of the trade union shall represent, fairly and without discrimination, all employees in the bargaining unit."

In Canadian Merchant Service Guild v. Gagnon et al., supra, the Supreme Court of Canada traced the origins of the duty of fair representation to a series of decisions emanating from the United States culminating with the United States Supreme Court decision in Vaca v. Sipes (1967), 386 U.S. 1971). For our purposes here there is no need to recount that history, it is sufficient to point out that by amendments in 1984, the statutory duty under the Code became more narrowly defined by the adoption of the wording which is now contained in section 37:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

(emphasis added)

To date, the Board has not attempted to define the exact scope of the duty of fair representation under the Code resulting from the 1984 amendments. Other than for some discussions about the impact of these amendments on complaints going to a trade union's conduct during the negotiation of collective agreements, the Board has pretty well met each circumstance as it has arisen (see Gordon Parsley et al. (1986), 64 di 60; 12 CLRBR (NS) 272; and 86 CLLC 16,018 (CLRB no. 555); and Peter G. Reynolds et al. (1987), 68 di 116; and 87 CLLC 16,011 (CLRB no. 607) for an overview of the apparent effect of the 1984 amendments to section 37 vis-à-vis negotiations). Here, we are going to meet the question raised about the scope of section 37 vis-à-vis judicial review by going to the very root of the duty of fair

representation, i.e., the exclusivity of CUPW's bargaining rights. This is why we emphasized the words of the Supreme Court of Canada in the excerpt from Canadian Merchant Service Guild v. Gagnon et al., *supra*, reproduced earlier in these reasons and which we now restate:

*"1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit."*

It seems to us that it is the scope of this exclusive power to represent that is the key to the answer of whether judicial review falls within the ambit of section 37 of the Code.

This was the approach taken by the Ontario Labour Relations Board in Anisia Mordowanec [1985] OLRB Report June 889:

*"The statutory duty of fair representation was initially conceived as a kind of 'counterbalance' flowing from the union's exclusive bargaining agency granted by statute (see Vaca v. Sipes, (1967), 386 U.S. 1971 (U.S.S.C.) and Walter Princedonu v. Canadian Union of Public Employees, Local 1,000 - Ontario Hydro Employees' Union, [1975] OLRB Rep. May 444). In the collective bargaining world the employee does not have the right to bargain his own individual terms and conditions of employment. Nor does he have the right to enforce or insist upon the enforcement of the terms of the collective agreement to which he is not a signatory party. Under our legislative scheme, those rights are vested exclusively in the trade union. The union is his statutory agent. In this context, it is hardly surprising that the Legislature would determine that the union must exercise its 'monopoly position' in a manner that is neither arbitrary, discriminatory nor in bad faith. The statutory duty of fair representation is the natural concomitant of the union's position as exclusive bargaining agent. If the employee is not to be able to assert these*

collectively bargained rights on his own, he should at least have the assurance that his statutory bargaining agent will represent him fairly.

Here the situation is somewhat different. Apart from questions of funding, it does not appear that the complainant's right to participate in the application for judicial review depends upon or can be limited by the status of her union as exclusive bargaining agent any more than the union could have limited her right to bring an unfair labour practice complaint against her employer (as she, in fact, did). She may not be able to bargain individually with her employer, and she may not be able to insist on enforcement of an alleged violation of the collective agreement, but the union, as her statutory bargaining agent, cannot, and is not seeking to foreclose her participation in the judicial review proceeding. She has that right as a matter of law and quite apart from the Labour Relations Act and the union's statutory role. Whatever the general ambit of the union's representation obligation under section 68 of the Act (and we need make no decision in that regard), it does not extend in this case to underwriting the costs of her legal counsel in the pending judicial review proceedings."

(pages 895-896; emphasis added)

Like the Labour Relations Act of Ontario, the Code does not create a right of judicial review, nor does the collective agreement which CUPW administers. That right exists at law outside of and apart from the union's statutory role under the Code. This is obviously what this Board was referring to in Gordon Newell, supra, when it adopted the rationale expressed by the British Columbia Labour Relations Board in Charles Morgan, supra, which effectively said that where legislation speaks of representation in the context of the duty of fair representation it must be taken to mean representation in the negotiation or administration of collective agreements. We agree with these statements. Clearly, the concept of a duty of fair representation only applies where a bargaining agent enjoys exclusive representational powers.

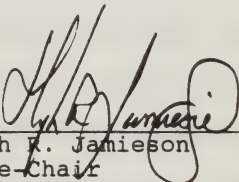
Under the Code CUPW does have exclusive bargaining agent rights to bargain collectively on behalf of the employees in its bargaining unit (section 36). However, since the amendments in 1984 when negotiations appear to have been removed from the scope of section 37 of the Code, CUPW's statutory duty of fair representation has been specifically limited to rights flowing from the collective agreement between the union and CPC. While the grievance-arbitration process arising from Mr. Varma's dismissal obviously had its genesis in rights under the Code, it is our opinion that CUPW's decision not to pursue judicial review is outside the scheme of collective bargaining and mandatory dispute resolution mechanisms contemplated by the Code to which the union's duty of fair representation is attached.

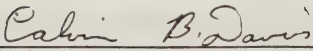
This is supported in our view by the substance of and the clear intent behind section 58 of the Code which provides that arbitration awards flowing from collective agreements under the Code are final and binding and are not to be reviewed in any courts. For the purposes of the Federal Court Act, which is the normal avenue for redress from matters arising from the Code, an arbitrator or an arbitration board pursuant to a collective agreement under the Code is deemed not to be a federal board, commission or other tribunal within the meaning of that Act. In the face of these specific restrictions, it seems highly improbable that the legislators would have intended this Board to scrutinize actions by bargaining agents related to judicial review under its supervisory powers in section 37. Even more unlikely is the possibility that Parliament intended that the Board would exercise its remedial powers under section 99 of the Code to order a bargaining agent to initiate judicial review proceedings which the very construction of the Code attempts to prohibit.

There may be circumstances where decisions by bargaining agents about judicial review possibilities could appear to be arbitrary, discriminatory or made in bad faith. For example, a union could decide to seek judicial review on behalf of some members but could refuse to proceed for other employees in the bargaining unit because they are not members of the union. No matter how desirable it may seem for the Board to have powers to intervene in these situations, it is our respectful opinion that there is simply no jurisdiction under section 37 of the Code for the Board to do so. Consequently, Mr. Varma's demand for judicial review of the Teplitsky arbitration award was outside the purview of the Code and, therefore, beyond the reach of CUPW's duty of fair representation under the Code. On that basis, the complaint is dismissed.

Having so found, there is no need to address the issue of the timeliness of the complaint under section 97(2) of the Code.

The foregoing is a unanimous decision.

  
\_\_\_\_\_  
Hugh R. Jamieson  
Vice-Chair

  
\_\_\_\_\_  
Calvin B. Davis  
Member

  
\_\_\_\_\_  
Michael Eayrs  
Member

DATED at Ottawa this 24th day of September, 1991.

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## SUMMARY

H.D. SNOOK, APPLICANT, AND  
CANADIAN NATIONAL RAILWAY  
COMPANY, RESPONDENT.

Board File: 950-205

Decision No.: 895

## RÉSUMÉ

H.D. SNOOK, REQUÉRANT, ET  
COMPAGNIE DES CHEMINS DE FER  
NATIONAUX DU CANADA, INTIMÉ.

Dossier du Conseil : 950-205

Décision n° : 895

In this decision a single member panel of the Board reviewed a safety officer's decision which had been referred to the Board pursuant to section 129(5) of Part II of the Canada Labour Code. Chairman J.F.W. Weatherill confirmed the safety officer's decision in part and stated that he agreed with the safety officer's conclusions with respect to the safety measures implemented by the employer.

The employee who requested referral of the report had objected to being required to work in the immediate area where a spraying program for the suppression of weeds was being conducted. Chairman Weatherill agreed with the employee that the safety officer had not addressed this particular concern in his report but ruled that it was not necessary to issue a specific direction in this case because of corrective measures taken by the employer. Chairman Weatherill indicated, however, that a specific direction would be issued with respect to work in the immediate area of spraying if requested.

Chairman Weatherill also reviewed the procedures to be followed by the Board on a review of a safety officer's report. He stated that such a proceeding is not technically an appeal in which a safety officer must defend his decision or in which a particular party bears an onus. In such a proceeding the Board conducts its own summary inquiry into the circumstances in which a decision was made.

In reviewing Board procedures on review of a safety officer's report Chairman Weatherill referred to the Board's previous decision in Dumont (as yet unreported Board decision no. 868) and disapproved of certain comments made in that decision. In particular he disagreed with comments which suggested that the Canada Labour Relations Board is inappropriate as an arbiter of such cases and which questioned the wisdom of the legislative provisions which provided for Board review of safety officer's decisions. The comments in Dumont represented the personal views of the panel who decided that case and were not those of the Board.

Le Conseil, composé d'un seul membre, était saisi de la décision d'un agent de sécurité à la suite d'un renvoi aux termes du paragraphe 129(5) de la Partie II du Code canadien du travail. Le Président, J.F.W. Weatherill, a confirmé, en partie, la décision de l'agent de sécurité et exprimé son accord avec celui-ci pour ce qui était des mesures de sécurité prises par l'employeur.

L'employé qui avait demandé le renvoi du rapport au Conseil s'était opposé au fait qu'on lui demandait de travailler dans un endroit où l'on utilisait des herbicides. Le Président Weatherill a convenu que l'agent de sécurité n'avait pas abordé cette question particulière, mais il a conclu qu'il n'était pas nécessaire d'émettre de directives étant donné que l'employeur avait pris des mesures pour corriger la situation. Le Président a cependant indiqué que des directives seraient émises concernant le travail effectué dans l'aire d'arrosage, si les parties le demandaient.

Le Président Weatherill s'est également penché sur la procédure suivie par le Conseil lorsque celui-ci examine les rapports d'agents de sécurité. Il ne s'agit pas, à proprement parler, d'une procédure d'appel au cours de laquelle un agent de sécurité doit justifier sa décision ou dans laquelle une partie doit assumer le fardeau de la preuve. Dans ce genre d'affaire, le Conseil enquête sommairement sur les faits ayant donné lieu à la décision.

En faisant le point sur la procédure que suit le Conseil dans le cas du renvoi du rapport d'un agent de sécurité, le Président Weatherill a fait allusion à l'affaire Dumont, décision du CCRT n° 868, non encore rapportée, et a exprimé son désaccord avec certains commentaires contenus dans cette décision. Il désapprouve plus particulièrement les commentaires selon lesquels le Conseil canadien des relations du travail n'est pas un forum approprié pour trancher les décisions de cette nature et qui mettaient en doute la justesse des dispositions législatives concernant la révision, par le Conseil, des décisions d'agents de sécurité. Les commentaires formulés dans l'affaire Dumont reflétaient l'opinion personnelle du membre siégeant dans cette affaire et non celle du Conseil.



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Reasons for decision

H.D. Snook,

*applicant,*

and

Canadian National Railway  
Company,

*respondent.*

Board File: 950-205

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The Board was composed of Mr. J.F.W. Weatherill, Chairman  
(pursuant to section 156(1) of the Canada Labour Code).

A hearing in this matter was held at Vancouver on August  
29, 1991.

Appearances:

H.D. Snook, on his own behalf, assisted by T. Heise,  
fellow employee.

B.J. Ballingall and R. Bellamy, for Canadian National  
Railway Company.

This is a referral of a safety officer's decision under  
section 129(5) of the Canada Labour Code (Part II -  
Occupational Safety and Health). That section provides  
as follows:

"129.(5) Where a safety officer decides that  
the use or operation of a machine or thing does  
not constitute a danger to an employee or that  
a condition does not exist in a place that  
constitutes a danger to an employee, an  
employee is not entitled under section 128 or  
this section to continue to refuse to use or  
operate the machine or thing or to work in that  
place, but the employee may, by notice in  
writing given within seven days of receiving  
notice of the decision of a safety officer,  
require the safety officer to refer his  
decision to the Board, and thereupon the safety  
officer shall refer the decision to the Board."

In the instant case, the employee, Mr. H.D. Snook,  
invoked his right to refuse to perform certain work in

the railway's Lynn Creek Yard at Vancouver terminal on July 10, 1991. Mr. Snook is a Switch Foreman and he considered it unsafe to work in an area in which chemical spraying (for the suppression of weeds) was being done. A safety officer was called, as contemplated by Part II of the Code. The officer carried out an investigation promptly, although he did not in fact issue a decision on the matter that day, as the company undertook to suspend its spraying program pending determination of the safety issue. The safety officer, Mr. L.P. Trainor, after obtaining certain information with respect to the chemicals involved in the spraying and the recommendations as to their use, issued his decision, to the effect that there was no danger, on July 25, 1991. It is not clear when Mr. Snook in fact received notice of that decision, which would appear to have been sent to him by mail. Also, it would appear that on August 6, Mr. Snook requested by mail that the decision be referred to the Board, and this was done by Mr. Trainor on August 9.

At the hearing of this matter, the company raised a question as to the timeliness of the request which, under section 129(5) is to be made "within seven days of receiving notice of the decision". If "days" is to be read as referring to clear working days, then it would seem that the request for reference to the Board was made in timely fashion. In this case, the employer did not press the point and, without prejudice to any arguments the employer might seek to make in other circumstances, I conclude that the present reference is timely and will not proceed further with this point.

Section 130(1) of the Code provides that where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, "without delay and in a summary way" inquire into the circumstances of the decision and the reasons therefor. In the instant case the reference made on August 9, was received by the Board on August 13. The reference was acknowledged that day, and on August 23 the parties were advised that the matter would be heard on August 29.

At the hearing, a relatively informal, although orderly, procedure was followed. At the request of the Board, the safety officer was present and was called as the Board's witness for the purpose of clarifying the circumstances of the decision. Both parties were free to question the safety officer as well as each other, and to advance evidence and argument, the only limitations thereon being my own direction that the parties confine themselves to what was relevant, namely the safety issue. It was made clear to the parties that the safety officer was not there to "defend" his decision; that the proceedings were not in the nature of an "appeal" in any technical sense; and that there was no particular "onus" on anyone: the Board is, as the Code contemplates, conducting its own inquiry - in a summary way - into the circumstances in which a "no danger" decision was made.

In respect of the latter point it is, I think, appropriate to comment on remarks made by a panel of the Board in the recent Dumont case, as yet unreported CLRB decision no. 868. That was also a referral of a safety officer's decision with respect to work being performed by the company in the Vancouver area, although the safety

issue involved was very different from that which is now before me. At pages 5 to 11 of its reasons in the Dumont case, the panel of the Board seized of that matter set out its views as to the procedures appropriate in these cases and also commented at length on the wisdom of the provisions of the Canada Labour Code by which questions such as that now before me are referred to the Board. These views - or perhaps the manner and place in which they were expressed - have led to some misunderstanding, and would appear to have been taken by some as being the views of "the Board" as an institution. It should be stressed that such is not the case; these views are simply the personal views of the members of a particular panel of the Board made in the course of determining a question that was before that panel. While there are indeed cases in which a tribunal may properly comment on legislation and in particular on its drafting, the lengthy commentary and suggestions with respect to the legislation which were made in the Dumont case were, in my own respectful view, inappropriate.

In Dumont, the Board stated, at page 10, that "A major problem with this Board handling these matters is our lack of expertise in the field". The panel seemed to be of the view that occupational health and safety had developed into specialized field of expertise. Perhaps there is a sense in which that may be said, but in any event, expertise in itself does not solve disputes. Not only may experts differ among themselves, but it is possible that with respect to everyday working situations - practical as opposed to laboratory or theoretical

expertise - they may direct themselves to the wrong questions. Where disputes arise, and where they are not to be resolved by the use of force in one form or another, they are to be resolved by an appropriate dispute-resolution process. In Part II of the Canada Labour Code, Parliament has referred disputes of the sort which may arise under section 129 to this Board. I do not agree with those of my colleagues who decided the Dumont case that this Board is somehow inappropriate as the arbiter of such cases.

Indeed, in the Dumont case itself, the Board considered the matter "in the proper perspective" and examined the events in question in their labour relations context. That sort of consideration was quite proper and led to what certainly appears to be a quite correct disposition of the case - including, again quite correctly, some good labour relations advice to the parties. With respect to the safety issue itself, the Board analyzed it, and directed itself to the nature and sufficiency of the consideration which the safety officer had given it. It did not "second guess" certain published safety standards, although it did assure itself that those standards were those of appropriate authorities. In the result, it is my own view that the Dumont case is in fact a good example of the sort of case which it is appropriate for this Board to hear.

In the instant case, when the safety officer arrived at Lynn Creek yard on the day in question, he found that Mr. Snook had invoked his right to refuse to work in respect of a certain portion of the trackage in the yard where a spraying truck had recently passed or was about to

pass. The truck was spraying the yard area with weed-killing chemicals. This was not simply an aesthetic endeavour; weed control in itself has an important safety aspect. Nevertheless, while it is important to kill weeds, that is not something to be done at any price (it should be remembered, however, that any method of performing such a task - with scythes, for example, carries certain dangers), and it is more than reasonable - it is, I think, their duty - for employees to be concerned about the handling and application of toxic chemicals in their work areas and particularly about their own contact with them.

Although the safety officer was quite qualified, knowledge of the chemicals involved was not within the scope of his expertise, nor could it be expected that it would be. As it happened (and no one explained how it happened, although all seemed to agree that it was a good thing it did), a Mr. Engelmann, Environmental Control Officer with North Shore Health was on the premises at the time, and made a number of suggestions which the safety officer found helpful. These suggestions were essentially based on the wise premise that where contact with chemicals known to have some degree of toxicity is involved, it is better to err on the side of caution. The company accepted these suggestions, the safety officer went to conduct his research on the matter, and Mr. Snook and other concerned employees returned to work. While the events of the day may not have been without labour relations overtones, it should be said at once that there is no suggestion here of any abuse of the procedures contemplated by the Code. Mr. Snook's concerns are legitimate ones, and must be addressed with

care.

The company had been carrying out a weed spraying program in the Greater Vancouver Terminal for several weeks, and, it would appear, had been spraying in the Lynn Creek yard for a few days prior to Mr. Snook's refusal. Mr. Snook had himself worked in the yard while spraying was being carried on, but at those times it was being carried on in another area of the yard from that in which he was working. On the day in question, Mr. Snook was asked to pass the spraying truck on a track immediately adjacent to that on which the spraying was being conducted. There was, I consider, the probability in these circumstances that parts of the equipment Mr. Snook would have contact with - both yard switches and portions of the engine - would be moistened by the spray, and there was as well the possibility that his own clothing might be moistened by it, or that he might have some contact with associated vapours. It is true, and Mr. Snook gives this as his reason for referring the decision to the Board, that the safety officer did not directly address the matter of Mr. Snook's potential direct contact with these toxic materials.

The safety officer's decision deals essentially with the toxicity of the chemicals involved and the regulations affecting their use. At the hearing before me, no question was raised as to the accuracy of the safety officer's findings in this respect. Two chemicals were involved: one, diuron, known as Karmex and the other, glyphosate, known as Round-up. On a toxicity chart of industrial herbicides, both are rated "slightly toxic". Application of such herbicides may be done only on the

authority of a permit issued by the British Columbia Ministry of the Environment, which issues such permit after notifying several agencies. The appropriate permit was issued in this case, subject to certain conditions, which were met. The contractor who carried out the spraying was licensed to do so, and experienced in the work. The operators who applied the spray were also properly certified and were experienced.

While the operators (employees of the contractor) who actually handled the chemicals and applied the spray were required to wear certain protective clothing and carry out certain sanitizing procedures, the only caution indicated in the material for those not involved in the actual application would appear to be that a four-hour "re-entry" period should be observed, unless the person is wearing boots and pants. In a letter to the safety officer dated July 18, 1991, the company made the following statement:

"Employees were notified in advance of application of the products. Areas to be treated were posted. As a further precaution, employees were asked to avoid treated areas for four hours, but in fact, boots and long pants provide sufficient protection, and employees were so advised. A CN supervisor was present to control or stop application by the contractor if employees came into the area while the track was being treated."

"Danger" is defined in section 122(1) of the Canada Labour Code as follows:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected;"

After referring to the evidence to the effect that the chemicals in question had been the subject of research and approval by the appropriate authorities, and that a

proper permit had been obtained, the safety officer concluded his decision as follows:

Based on my review of the evidence it is my opinion that:

a) Precautions necessary/required by the various regulatory agencies involved in the approval and use of the product have been met.

b) Spraying was carried out by a reputable firm in possession of the proper certification and Use Permit that was required.

c) The railway had adequately enforced those provisions relating to locations to be sprayed and the Restrictions of the Use Permit.

On the basis of the evidence developed through the investigation it is my conclusion that the conditions inferred by Mr. Snook under section 128 (1) (a) & (b) of the Canada Labour Code, Part II did not constitute a danger to Mr. Snook on July 10th 1991."

In a general way, I think there is no doubt but that the safety officer's conclusions are correct. Mr. Snook is right, however, in saying that the decision did not address his particular concern, which was that of being in close proximity to the spraying operation while it was taking place. The company's immediate action more than addressed that concern - it appears from the general notice posted on July 10:

"Effective immediately CN's weed spray program has been suspended in G.V.T. until further advised. All crews operating from Lynn Creek will be supplied rubber gloves and a dust mask. These measures are being taken to alleviate any concerns related to Safety and Health. It is strongly recommended that all crews follow these instructions.

Further, all switches located in the affected areas are being wiped and washed clean by the engineering department. It is suggested when crews stop for coffee or lunch, they rinse off their gloves and the soles of their boots. On completion of shift it is suggested that clothes be washed separately to ensure that any material residue that has come in contact with the clothing is removed.

Again all crews should follow the above

instructions for a 24 hour period up to and including 1130 P.D.T. 11 July 1991."

From the material before me, it would appear that the company has erred on the side of caution, but the decision to suspend the spraying program while this matter was determined appears to have been by agreement. The particular concern which has troubled Mr. Snook, which is a reasonable concern, was anticipated, I think, by the company, and is implicit in the company statement of July 18, set out above, part of which is worth repeating:

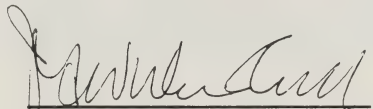
"A CN supervisor was present to control or stop the application by the contractor if employees came into the area while track was being treated".

The reasoning behind this must surely have been that railway employees in the immediate area of the spraying are in a position very close to that of the applicators themselves, for whom certain protective clothing is required. Thus, if employees are to be in the immediate area of the spraying, which would include passing on an adjoining track, then either one of two things should happen: the spraying should stop while the crew passes, or the crew, if they are to be in the area any length of time, should be required to wear appropriate protective clothing in addition to their normal work clothes. Apart from recognizing the special case of work being done in the immediate area of spraying, I am satisfied that the decision of the safety officer is correct: the spraying operation is, as a general matter, safe, and given CN's work wear requirements, there is no need for a special re-entry rule.

Having regard to the provisions of section 130 of the

re-entry rule.

Having regard to the provisions of section 130 of the Code, it is my view that it is not necessary to make a specific direction in this case, since the safety officer's decision is in other respects confirmed, and since the particular qualification which I have stressed would appear to have been anticipated by the company's instructions to supervisors. If requested, however, a specific direction will be issued with respect to work in the immediate area of spraying.

  
J.F.W. Weatherill  
Chairman

DATED at Ottawa this 25 th day of September, 1991.

CLRB/CCRT - 895



# information

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## SUMMARY

**B. PAQUIN, COMPLAINANT, CAFAS INC., MIRABEL, QUE., EMPLOYER, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS**

**Board File: 950-174**

**Decision No.: 896**

A refueler at the employ of CAFAS at Mirabel was suspended because he refused to back his hydrant cart into position for refueling a Lockheed 1011 aircraft. The employee alleges that his refusal was motivated by safety concerns. He claims that his suspension contravenes Paragraph 147 a) Part II of the Canada Labour Code.

The Board has determined that the circumstances of the refusal are too ambiguous, and the expression of the refusal too unclear as to its safety and health reasons to accept the applicant's version of events. It is the Board's finding that this employee was not suspended because he exercised a safety right under the Code. The complaint is therefore dismissed.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

## RÉSUMÉ

**B. PAQUIN, PLAIGNANT, ET CAFAS, INC., MIRABEL, QUÉ., EMPLOYEUR, ET ASSOCIATION INTERNATIONALE DES MACHINISTES ET DES TRAVAILLEURS DE L'AÉROSPATIALE, SYNDICAT.**

**Dossier du Conseil: 950-174**

**Décision n<sup>o</sup>: 896**

Un avitailleur de la société CAFAS de Mirabel a été suspendu pour avoir refusé de reculer un camion-avitailleur sous le panneau d'avitaillement d'un Lockheed 1011. Le plaignant soutient que son refus était motivé par un souci de santé et sécurité. Il prétend que, ce faisant, l'employeur a contrevenu à l'alinéa 147a) de la Partie II du Code canadien du travail.

Le Conseil a jugé que les circonstances du refus sont trop ambiguës, et l'expression du refus trop confuse quant aux motifs de santé et sécurité prétendument soulevés, pour retenir la version du plaignant. En conséquence, le Conseil estime que l'employeur n'a pas suspendu le plaignant parce que ce dernier avait exercé un droit de refus protégé par le Code. La plainte est donc rejetée.



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relations du  
travail

Reasons for decision

Bruno Paquin,  
*complainant,*  
*and*

CAFAS Inc.,  
Mirabel, Quebec,  
*employer,*  
*and*

International Association of  
Machinists and Aerospace  
Workers,  
*union.*

Board File: 950-174

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The Board was composed of Mr. François Bastien, sitting as a single-member panel under section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

Mr. Claude Tardif, accompanied by Mr. Vincent Blais, representing the IAM, for the complainant; and  
Mr. Paul Venne, accompanied by Mr. Raymond Normandin, supervisor, for CAFAS Inc.

I

The proceedings

This case concerns a complaint filed with the Board on January 31, 1991 by Bruno Paquin (the complainant). In his complaint, Mr. Paquin alleges that the employer, CAFAS (Mirabel), contravened section 147(a) of the Canada Labour Code (Part II - Occupational Safety and Health) by disciplining him when he refused to perform, on January 13, 1991, certain manoeuvres on his hydrant cart because he feared for his safety and health.

CAFAS (the employer), for its part, submits that the complainant was suspended for refusing to obey his supervisor, Raymond Normandin, who ordered him to perform a back-up manoeuvre in order to refuel a Lockheed 1011 aircraft.

The Board heard the parties in Montréal on March 28 and August 13 and 14, 1991.

## II

### Evidence

Mr. Paquin, employed by CAFAS since 1987 as an aircraft refiller, performed his duties at Mirabel Airport until the summer of 1991, when he was transferred to Dorval. When he took up his duties, he received two weeks of on-the-job training under the supervision of an employee, Mr. Lachance, who had some 22 years of service with CAFAS. At the time he was hired, the complainant held a class 1 chauffeur's licence which authorized him to drive various types of tractor-trailers of unlimited size. In November 1989, Mr. Paquin helped set up an occupational safety and health committee and served as union co-chair of this committee until April 1991. The employees are represented by the International Association of Machinists and Aerospace Workers (IAM).

At the time of the January 13, 1991 incident, Mr. Paquin's shift supervisor was Raymond Normandin who himself reported to the senior supervisor, Dominic Caccese.

CAFAS is an affiliate of an American multinational, Ogden Allied Services, whose airport services include aircraft refuelling. At Mirabel, some aircraft are refuelled using

a tanker truck and others using hydrant carts. In the latter case, refuelling consists in connecting the underground fuel storage tank to the fuel tank of the aircraft by means of a hydrant cart. This vehicle filters the fuel and pumps it into the aircraft. Mirabel Airport uses two models of this vehicle: (a) the conventional model where the hoses are connected to the aircraft manually, and (b) the newer model where these same hoses are connected directly to the aircraft's fuel tank by means of a hydraulic platform. The model involved here is the conventional one.

Mirabel Airport has a large number of service areas or stations where a number of service functions besides refuelling, such as cleaning and the provision of food and drink, are performed to prepare an aircraft for a flight. The constant vehicular traffic between these points and the other airport installations is another feature of the work environment of CAFAS employees. Aircraft must be refuelled in a short period of time that varies depending on the amount of fuel required and the number of hydrant carts assigned to the task.

There are differing interpretations of the circumstances in which the complainant refused to work, in particular over the remarks he and his supervisor, Mr. Normandin, exchanged, but these circumstances are, in the main, relatively clear. They can be summarized as follows.

1 - At the start of his shift, around 12:30 p.m., Mr. Paquin was ordered to go and refuel a Lockheed 1011 aircraft at the Air Transat refuelling station. He boarded a conventional hydrant cart and, as he approached the aircraft, saw that a service truck was working around the body of the aircraft, blocking his access to it. Normally, to position the hydrant cart

to refuel this type of aircraft, the operator approaches the aircraft from the rear, driving forward until his vehicle is level with the wings, opposite the refuelling panel. Mr. Paquin therefore decided to wait a few minutes until the service truck left the vicinity of the aircraft. He testified that although he had had to perform these back-up manoeuvres a number of times, in particular with other types of aircraft or with a tanker truck, he had never had to do so with the Lockheed 1011.

2 - In the meantime, another employee, Ronald Audet, had gone to the Air Transat station on the orders of the shift supervisor, Raymond Normandin. He was to help Mr. Paquin refuel the Lockheed aircraft. Upon his arrival, he saw that the complainant had yet to move; he instructed him to drive round again and then back up. Mr. Paquin refused to perform this manoeuvre and then climbed back into his vehicle to speak to his supervisor, Mr. Normandin.

3 - The exact nature of the remarks exchanged by radio between the two is unclear. Mr. Normandin testified that he heard Mr. Paquin say to him, "Come and assume your responsibilities," whereas the only remark that Mr. Audet specifically recalled hearing was "I'm not moving." According to the complainant's own recollection, he told Mr. Normandin that he refused to be guided. Whatever the case, Mr. Audet then returned to his initial assignment, i.e. refuelling an aircraft in the Air France station, while Mr. Normandin made his way to the Air Transat zone. He got out of his vehicle and motioned to Mr. Paquin to drive forward. In doing so, the complainant overshot the wing of the aircraft and then had to back up, guided by the hand signals of

Mr. Normandin who was standing between the cart and the aircraft engine. The complainant testified that Mr. Normandin, who was very angry, was gesticulating wildly and that he could not always spot him in his rear-view mirror.

4 - The testimony of the supervisor and that of the complainant differ somewhat on what happened next. According to Mr. Normandin, Mr. Paquin backed up the cart a few feet and stopped. He remained seated in his vehicle with his protective ear gear on and his window closed. Not until he got out of the cart a few moments later did the complainant refuse to answer when asked whether he really wanted to do the assigned work. Mr. Paquin, for his part, stated that he was still in the truck with the window half open when he heard his supervisor order him to go home. He quickly complied, borrowing the vehicle of another aircraft refiller, Steve Mirk, whom Mr. Normandin had ordered to go to the Air Transat storage tank and refuel the aircraft. It was Mr. Mirk who finally completed this task.

5 - When he reached the office, Mr. Paquin went to see the operations manager, Eddie Dimo, to ask him if he was aware of the incident. Mr. Dimo said he was and told the complainant to go home. It was after he arrived home that Mr. Paquin contacted Labour Canada to discuss his refusal. Safety officer Bernard Dessureault went to Mirabel Airport around 4:00 p.m. to meet with the managers and the complainant, who had returned to the airport. After interviewing the parties, all the safety officer could determine was that it was impossible to render a decision on the condition in question because it had disappeared in the meantime.

6 - A meeting was called for January 17, 1991 to review the incident of January 13. At the meeting, the union was represented by the complainant and Jean Carrière, shop foreman, and the employer by Raymond Normandin and Dominic Caccese, senior supervisor. The complainant was asked why he refused help from Mr. Audet. According to Mr. Caccese, Mr. Paquin replied that he did not trust Mr. Audet. Mr. Normandin testified to the same effect. The union representative, Jean Carrière, did not testify. Mr. Paquin denied saying this, but explained in another part of his testimony that Mr. Audet was not familiar with the back-up manoeuvre.

Following the meeting, the complainant was suspended for six days by letter. This letter reads as follows:

*"Following a meeting held on January 17, 1991 in the presence of Mr. R. Normandin, Mr. J. Carrière, yourself and the undersigned concerning your being sent home from work on January 13, 1991 by Mr. Ray. Normandin, it was determined that you were dispatched on flight No. 770 Air Transat.*

*You called the office that you could not perform your duties because you had to back up, at this time the supervisor sent Mr. Ron Audet to assist you, when Mr. Audet arrived you refused his assistance which was confirmed by yourself at this meeting and stated 'you did not trust him'. At this time you called Mr. R. Normandin over the radio and demanded that he should take his responsibilities [sic] and come and guide you to back up. When Mr. Normandin came you did back up but sat in the truck for two to three minutes.*

*At this time Mr. Ray. Normandin advised you that if you did not want to fuel the flight, to go home, only after this did you state it was unsafe to fuel or back up vehicle [sic]. This leaves me no choice but to suspend you for 6 working days without [sic] pay for the following reasons:*

- 1. Insubordination and complete disrespect towards your supervisor.*
- 2. You did not follow company policy.*
- 3. You refused the assistance of a guide, so you could perform your duties as agreed to by the company and IAM 2301.*

*Please be advised that any further disruptions of company policy or insubordination will result in your immediate dismissal.*

*Regards*

*Dominic Caccese  
Senior Supervisor"*

Both the union's and the employer's evidence dealt at length with the training programs provided by CAFAS and, more particularly, the training received by the complainant on aircraft refuelling. The Board notes from this evidence that this program is not applied systematically. It is offered as resources and time permit (for example, videos are viewed between refuelling assignments). Essentially, priority is given to on-the-job training under the supervision of experienced employees. Thus, during the first two weeks that Mr. Paquin worked at Mirabel, Mr. Lachance, a CAFAS employee with several years' experience, was given the task of teaching him the basic duties of aircraft refiller by accompanying him on all his assignments. However, the teaching material is still largely in English; French versions, in particular of the videos and the hydrant cart manual, are currently in preparation. Mr. Paquin explained that he has a limited knowledge of English, which explains why he viewed only one video dealing with various aspects of the refuelling technique.

As for the hydrant cart operator's manual, the employer admitted that only excerpts from this document had been distributed to the employees, depending on the interest shown by and the time available to them individually, with no follow-up to determine which parts of the manual they had read or retained.

### III

#### Arguments of the parties

The employer argued that the complainant never cited safety and health considerations to justify his decision to refuse to refuel the Air Transat Lockheed 1011. His supervisor, Mr. Normandin, testified that neither the complainant's words nor his actions persuaded him for a minute that his refusal was for reasons of safety and health. On the contrary, these reasons did not surface until after the complainant was sent home. Mr. Normandin's boss, the senior supervisor, Dominic Caccese, also testified that CAFAS did not believe for a minute that the refusal was related to safety and health, until the Labour Canada safety officer appeared. In the employer's opinion, the complainant was not a highly motivated employee and was on occasion quite prepared to defy authority. In the case of the January 13 incident, the employer felt that this was the type of insubordination whose cause was hard to pinpoint, but which had nothing to do with safety.

The complainant, for his part, argued that his inexperience in performing the back-up manoeuvre showed that there were legitimate safety and health considerations. Mr. Paquin recalled his uncontradicted testimony to the effect that the manoeuvres he had performed many times in the past in order to back up tanker trucks were always performed around aircraft other than the Lockheed 1011. He submitted that he could not perform the only manoeuvre that his teacher, Mr. Lachance, had taught him during his training. This was why he decided to wait until the other truck was out of the way. When he was ordered to go around this truck and back up in the direction of the aircraft, he refused Mr. Audet's help and tried to explain his behaviour to Mr. Normandin.

If he finally obeyed Mr. Normandin's order to back up, he did so, he said, because at that point, performing this manoeuvre posed no danger. He concluded that Mr. Normandin knew perfectly well that his refusal was dictated by safety and health considerations.

#### IV

#### The law

The following provisions of the Code establish the context in which the Board must weigh all the evidence presented:

*"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that*

*(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or*

*(b) a condition exists in any place that constitutes a danger to the employee,*

*the employee may refuse to use or operate the machine or thing or to work in that place.*

...

*133.(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party.*

...

*147. No employer shall*

*(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee*

...

*(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."*

This context, it should be reiterated, is relatively narrow. The safety officer was unable in fact to investigate the strictly objective aspects of the circumstances that led to the refusal since they no longer existed when the officer arrived at the work place.

The question the Board must answer is whether the decision of the employer to suspend the complainant is related in any way to this employee exercising his right to refuse to work because he had reasonable cause to believe that there was a danger to himself or to another employee. Under section 133(6) of the Code, the burden is on the employer to satisfy the Board that its reasons for suspending the complainant had nothing to do with the safety and health considerations cited by the complainant.

V

Decision

Given the positions of the parties, it is essential to determine what really happened before deciding which side was right.

The employer did not believe that the complainant's refusal was motivated by safety and health considerations. The circumstances are not clear-cut. The Board's task, specifically, is to examine the credibility of the versions presented by each of the protagonists, Messrs. Paquin and Normandin. Does the present case really involve a genuine concern over safety and health?

Mr. Audet is the only witness, apart from Mr. Paquin, with firsthand knowledge of the reasons for the complainant's

refusal, reasons that the complainant allegedly communicated to his supervisor by radio. Mr. Audet was evasive in his testimony before the Board. The only part of the radio conversation he recalled was the complainant's words "I'm not moving." No further words were apparently exchanged between Mr. Audet and Mr. Paquin following the conversation with Mr. Normandin. In other words, the complainant did not tell him, even implicitly, that he was refusing to work. As for the testimony of André Tremblay, a colleague of the complainant on the safety and health committee, he did not witness the actual events, but learned of them only after the fact in a telephone call from Mr. Paquin.

The complainant testified that he told his superior that he refused to be guided to which Mr. Normandin replied that, if he did not know how to drive, then he should go home. It was after Mr. Normandin had arrived at the scene of the incident and the complainant had begun the manoeuvre to move the cart that Mr. Paquin, who was upset by the gestures of his angry supervisor, felt endangered. He had then indicated to Mr. Normandin that it was too dangerous. He testified that he had already refused a first time during the radio conversation.

Mr. Paquin's testimony concerning this part of the incident is very unclear. Similarly, his repeated statement that it was obvious that the refusal was health-related indicates to us, on the contrary, that things were not all that clear.

We cannot accept the claim that Mr. Paquin refused twice, the first refusal being communicated during the radio conversation, and the second directly to Mr. Normandin in his presence. The evidence concerning this matter is totally confusing. As we have seen, the complainant is a headstrong individual who obviously is not intimidated by

authority. If Mr. Paquin had really feared for his safety and health when he first refused, why would he have been content to react in the timid manner he described? Neither Mr. Normandin's orders nor his gestures could have intimidated him, let alone the radio.

When the incident took place, the complainant was well aware of the provisions of Part II of the Canada Labour Code dealing with the exercise of the right to refuse to work. He was also well aware of the procedure, but knew that Mr. Normandin was aware of it too. It is in this light that the Board must examine the full sequence of events. As we stated earlier, Mr. Paquin insisted repeatedly during his testimony that Mr. Normandin must have known what the situation was. On the contrary, all the evidence points to a conversation that left much unstated and that was short on specifics, in which the two participants were sizing up one another. Thus, Mr. Normandin was convinced that the complainant was deliberately being difficult, whereas Mr. Paquin was of the opinion that Mr. Normandin was the one who should have known that his refusal was safety-related. This was in fact a clash of wills that, given the time constraints, Mr. Normandin used his authority to end.

Mr. Normandin's behaviour, even as described by the complainant, confirms to us that the complainant did not cite safety and health considerations to justify his refusal. The supervisor interpreted Mr. Paquin's behaviour as obstinacy and the complainant persisted, whereupon Mr. Normandin became angry. Once on the scene, Mr. Normandin guided the complainant with hand motions. Mr. Paquin obeyed for a few seconds, then stopped again. This action seems peculiar when one recalls that Mr. Paquin's fear was initially triggered by his inexperience in performing the back-up manoeuvre. Why would

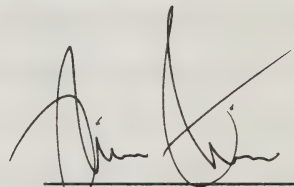
someone thoroughly familiar with the refusal procedure in the Code willingly perform this manoeuvre if that person really believed that it posed a danger and had already refused once?

The complainant's statements regarding the specific reasons for his refusal also remain unclear. He testified variously that he was afraid of sparks flying, of running over his supervisor, and of his inexperience in performing the back-up manoeuvre. These statements are hard to reconcile with the complainant's unquestionable qualifications as a driver and his experience in performing similar manoeuvres. No doubt that the circumstances such as those that prevailed that day could have given rise to genuine concerns over safety, but this is not what the evidence revealed in the instant case.

The Board must therefore conclude that the disciplinary action taken against the complainant was not related to the exercise of his right to refuse to work for reasons of safety and health. As the complainant did not clearly express such reasons, his supervisor believed in good faith that the refusal was not dictated by health considerations. He had therefore not penalized him for his refusal. The Board fully concurs with the views expressed by counsel for the complainant when he argued that an employee does not have to use any "ritualistic words" or magic formula to express his refusal. Our numerous past decisions on this subject are clear in this regard (see in particular John Charters et al. (1989), 76 di 188; and 3 CLRBR (2d) 253 (CLRB no. 727), pages 198; and 263). So long as the reason for the refusal is sufficiently clear, the Board remains free to interpret this right very broadly and its exercise is fully authorized. However, this rule must never be used to justify the clashes or conflicts of authority or

personality that inevitably occur in the work place. As the Board stated in David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686), the purpose of this Part of the Code is to ensure that safety and health are never compromised. The perception of apprehended danger may sometimes prove to be incorrect or exaggerated, but if this fear leads an employee to refuse in good faith, then this right, which is fully protected by the Code, is exercised legitimately. However, this perception must be expressed, either by word or action, in such a manner that it is, if not accepted (in which case the procedure set out in the Code is triggered), then at least clearly conveyed.

For all these reasons, the Board dismisses the complaint.



---

François Bastien  
Member

ISSUED at Ottawa, this 10th day of October 1991.

# information

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## Summary

CANADIAN BROADCASTING CORPORATION,  
APPLICANT; AND THE ALLIANCE OF  
CANADIAN CINEMA, TELEVISION AND RADIO  
ARTISTS, RESPONDENT.

Board File: 530-1924

Decision No.: 897

These reasons deal with an application under the reconsideration provisions in section 18 of the Canada Labour Code (Part I - Industrial Relations) wherein the Canadian Broadcasting Corporation (CBC) is seeking to have the Board vary its decision in Canadian Broadcasting Corporation, unreported Board decision no. 839. In that decision, a majority found CBC in violation of section 94(1)(a) of the Code by insisting that Mr. Dale Goldhawk resign from his position as President of the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) as a condition precedent to his continuing to host a public affairs radio program known as "Cross Country Check-Up".

The application was dismissed. In its reasons the Board discusses the Board's concerns about the finality of its decisions and its corresponding policy applicable to applications for reconsideration. In this particular application the panel found that CBC had failed to raise anything that would throw the interpretation of the Code applied by the majority of the original panel into serious doubt and which would warrant a review by the full Board sitting in plenary session. The panel further concluded that the majority decision was well within the trend of the Board's past practice when dealing with this type of situation.

As an aside, the Board uses the opportunity of this decision to highlight a change in the name of panels of the Board assigned to screen applications for reconsideration of recent Board decisions. These panels will no longer be referred to as submit panels. They will simply be called reconsideration panels.

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## Résumé de Décision

LA SOCIÉTÉ RADIO-CANADA, REQUÉRANTE,  
ET L'ALLIANCE DES ARTISTES CANADIENS  
DU CINÉMA, DE LA TÉLÉVISION ET DE LA  
RADIO, INTIMÉE.

Dossier du Conseil: 530-1924

Décision n° 897

Il s'agit ici d'une demande de réexamen présentée en vertu des dispositions de l'article 18 du Code canadien du travail (Partie I - Relations du travail), dans laquelle la Société Radio-Canada tente de faire réexaminer par le Conseil la décision rendue dans Canadian Broadcasting Corporation (1990), 91 CLLC 16,007; décision du CCRT n° 839, non encore rapportée en français. Dans cette décision, la majorité a jugé que l'employeur avait enfreint l'alinéa 94(1)a) du Code en exigeant que M. Dale Goldhawk démissionne de son poste de président de l'Alliance des artistes canadiens du cinéma, de la télévision et de la radio (ACTRA) pour conserver son poste d'animateur d'une émission radiophonique d'affaires publiques, soit «Cross Country Check-Up».

La demande a été rejetée. Dans ses motifs, le Conseil a passé brièvement en revue ses préoccupations quant au caractère décisif de ses décisions et sa politique en matière de demandes de réexamen. Dans la présente demande, le Conseil a jugé que l'employeur n'avait soulevé aucun élément nouveau qui mettrait sérieusement en doute l'interprétation du Code qu'a donnée le banc de membres initial et qui justifierait une révision par le Conseil réuni en séance plénière. En outre, il a jugé que la décision de la majorité cadrerait bien avec la pratique passée du Conseil en la matière.

Par ailleurs, le Conseil profite de l'occasion pour faire part du nouveau nom des groupes de membres chargés d'examiner les demandes de réexamen de décisions récentes. Ces groupes seront connus dorénavant comme bancs de révision.

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Reasons for decision

Canadian Broadcasting  
Corporation,

*applicant,*

and

The Alliance of Canadian Cinema,  
Television and Radio Artists,

*respondent.*

Board File: 530-1924

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The Board was composed of Mr. J.F.W. Weatherill,  
Chairman, and Messrs. Hugh R. Jamieson and Thomas M.  
Eberlee, Vice-Chairmen.

Appearances: (on record)

Ms. Suzanne Thibault, Q.C., for the applicant; and  
Mr. Paul J. Falzone, for the respondent.

The reasons for this decision were written by Mr. Hugh  
R. Jamieson, Vice-Chairman.

I

These reasons deal with an application by the Canadian  
Broadcasting Corporation (CBC) under section 18 of the  
Canada Labour Code (Part I - Industrial Relations):

"18. The Board may review, rescind, amend,  
alter or vary any order or decision made by  
it, and may rehear any application before  
making an order in respect of the  
application."

In the application which was filed with the Board on January 24, 1991, CBC seeks reconsideration of the decision of the Board in Canadian Broadcasting Corporation, unreported Board decision no. 839 dated December 20, 1990 wherein a majority found that CBC had violated section 94(1)(a) of the Code by requiring Mr. Dale Goldhawk to resign from his position as President of the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) as a condition precedent to his continuing to host a public affairs radio program known as "Cross Country Check-Up". Apparently, CBC had viewed certain statements attributed to Mr. Goldhawk in an ACTRA publication called "ACTRASCOPE" regarding the Canadian/U.S. Free Trade deal as a breach of its Journalistic Policy which is designed to ensure the impartiality of its journalists and on-air hosts. The majority of the panel of the Board that heard the matter rejected CBC's argument in this regard and summarized its finding as follows:

*"As mentioned earlier, it is not for us to determine whether the CBC's Journalistic Policy is legitimate nor well established. Let it suffice to say that even if the publication of Mr. Goldhawk's article in the union's newsletter had actually contravened the CBC's Journalistic Policy, the CBC could not, under the Code, take the action it took with respect to Mr. Goldhawk in the circumstances of this case."*

(Canadian Broadcasting Corporation (1990),  
CLRb no. 839 at page 69)

A Member of the panel dissented on the ground that public statements on political issues made by union officials are not activities which are protected under the unfair labour practice provisions of the Code.

In its application for reconsideration CBC alleges that the majority had erred in fact and in law and had exceeded its jurisdiction in failing to recognize that its Journalistic Policy applied to Mr. Goldhawk.

ACTRA, in response to the application (which response we should note was delayed until August 1991) pointed out that CBC's Journalistic Policy had no force of law and that it was not binding on the Board. ACTRA basically submitted that CBC had not raised anything that was not before the original panel and it was merely re-arguing its case.

In its rebuttal dated September 5, 1991, to ACTRA's submissions, CBC confirmed that it had not based its application on new facts or new issues and reiterated its contention that the findings of the majority in decision no. 839 were seriously flawed with errors of law which amount to an excess of jurisdiction. CBC went on to assert that its Journalistic Policy had been approved by the CRTC and that the Board had failed to strike a balance between its obligations under the Broadcasting Act and ACTRA's rights under the Code.

On October 4, 1991, this quorum of the Board, acting in its capacity as a "Reconsideration Panel" (previously known as a summit panel - see Wardair Canada (1975) Ltd. (1983), 53 di 184; 84 CLLC 16,005 (CLRb no. 434)) considered all of the submissions of the parties in this application.

II

Before dealing with the merits of the application, let us repeat what was said recently in Canwest Pacific Television Inc. (1991), unreported Board decision no. 847, to the effect that reconsideration of decisions is the exception rather than the rule. The Board's primary concern is the finality of its decisions and the onus is therefore on an applicant to satisfy the Board that there are serious grounds which warrant the setting aside of the original decision. The primary function of a reconsideration panel is to screen applications with these policies in mind. Applications will not proceed past this initial screening stage if they do not provide new facts or circumstances which, if they had been known at the time, could have resulted in the Board arriving at a different conclusion. Applications alleging error in law or policy that do not contain something substantial which throws the interpretation applied by the original panel into serious doubt, will meet the same fate. Mere disagreement with the Board's analysis of the facts or with the interpretation of law or policy applied by the Board are not grounds for a review by the full Board sitting in plenary.

In this particular application CBC admits that it brings nothing new to the Board in its quest for reconsideration; what it is really hoping for is a different result if its re-emphasized argument is heard by different ears. To this end, CBC has couched its application in terms of error in law with emphasis on what CBC says is the threshold nature of the issues.

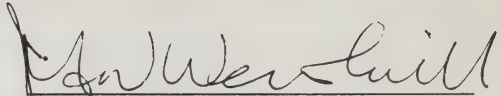
With all due respect, it is our view that the allegations of error in law are not well founded. The majority of the original panel clearly traced its way through the Board's jurisprudence and applied the criteria that has been established by various panels of the Board that have dealt with this particular issue of employer interference in the administration of trade unions.

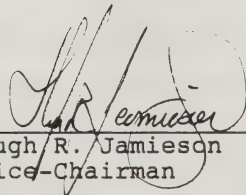
Obviously, one of the main purposes of these provisions of the Code is to prevent employers from having an input into who is elected into key union positions and also from having a means to influence how these elected union officials conduct their business. Each of these situations which come before the Board must be dealt with in light of the particular circumstances and, whether well intentioned or not, the effect of CBC's application of its Journalistic Policy in this case had the effect of depriving ACTRA's membership of the services of their duly elected President. This was found to be a violation of section 94(1)(a) of the Code which is, in our opinion, in keeping with the policies and past practices of the Board where it has dealt with situations involving employer action against union officers for having spoken publicly in their official capacities on topics which could affect the union.


CBC has failed to raise anything regarding the application of the law or policies that warrant this matter being referred to the full Board. Nor have there been new facts brought forward which could cause us to

refer the application back to the original panel for its consideration. The application is therefore unfounded and it is dismissed accordingly.

The foregoing is a unanimous decision.

  
J.F.W. Weatherill  
Chairman

  
Hugh R. Jamieson  
Vice-Chairman

  
Thomas M. Eberlee  
Vice-Chairman

DATED at Ottawa this 15th day of October, 1991.

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# information

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## Summary

JAMES CARR, MARK D. JAMES, ARCHIE  
A. HOWE, REID WILLIAM HUBLEY, AND  
INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION, LOCAL 1843,  
COMPLAINANTS, AND HALIFAX GRAIN  
ELEVATOR LIMITED, RESPONDENT.

Board Files: 745-3938  
745-3948  
745-3949  
745-3950  
745-3972

Decision No.: 898

These reasons deal with five  
complaints of unfair labour  
practices in which the complainants  
allege that the employer has  
violated the provisions of sections  
94(1)(a), 94(3)(a), 94(3)(b),  
94(3)(e) and 96 of the Canada  
Labour Code (Part I - Industrial  
Relations).

The complaints were allowed. The  
employer failed to satisfy the  
Board, on a balance of  
probabilities, that its decision to  
take action against employees  
covered by section 94 of the Code  
was not tainted with anti-union  
animus.

The remedies granted by the Board  
in this case include the  
reinstatement of the full number of  
sick leave days which each of the  
complainants took because of work-  
related stress.

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## Résumé de Décision

JAMES CARR, MARK D. JAMES, ARCHIE  
A. HOWE, REID WILLIAM HUBLEY ET LA  
SECTION LOCALE 1843 DE  
L'ASSOCIATION INTERNATIONALE DES  
DÉBARDEURS, PLAIGNANTS, ET HALIFAX  
GRAIN ELEVATOR LIMITED, INTIMÉE.

Dossiers du Conseil: 745-3938  
745-3948  
745-3949  
745-3950  
745-3972

No de Décision: 898

Il s'agit ici de cinq plaintes de  
pratique déloyale de travail, dans  
lesquelles les plaignants allèguent  
que l'employeur a enfreint les  
alinéas 94(1)a), 94(3)a), 94(3)b)  
et 94(3)e) ainsi que l'article 96  
du Code canadien du travail (Partie  
I - Relations du travail).

Les plaintes ont été accueillies.  
L'employeur n'a pas convaincu le  
Conseil, selon la prépondérance des  
probabilités, que sa décision de  
traiter les employés visés par  
l'article 94 du Code comme il  
l'avait fait n'était pas motivée  
par un sentiment antisyndical.

En guise de redressement, le  
Conseil ordonne entre autres le  
rétablissement des jours de congé  
maladie qu'ont dû prendre les  
plaignants en raison du stress  
lié au travail.



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Reasons for decision

James Carr,  
Mark D. James,  
Archie A. Howe,  
Reid William Hubley, and  
International Longshoremen's  
Association, Local 1843,

*complainants,*

*and*

Halifax Grain Elevator Limited,  
*respondent.*

Board Files:   745-3938  
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                  745-3950  
                  745-3972

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The Board was composed of Messrs. Serge Brault and J. Philippe Morneault, Vice-Chairs, and Mr. J. Jacques Alary, Member.

Appearances:

Mr. Normand LeBlanc, representative, Canadian Labour Congress, later replaced by Mr. David W. Quinn, Vice-President, International Longshoremen's Association, accompanied by Mr. Carl Haley, President, ILA Local 1843, for the complainants;

Mr. Gregory I. North, accompanied by Mr. J.E. Oakley, President, Halifax Grain Elevator Limited, for the respondent.

These reasons for decision were written by Mr. J. Philippe Morneault, Vice-Chair.

I

The Proceedings

This case deals with four complaints of unfair labour practices filed by individuals pursuant to section 97(1) of the Canada Labour Code (Part I - Industrial Relations) against Halifax Grain Elevator Limited (HGEL or the employer), alleging violation of sections 94(3)(a), 94(3)(b), 94(3)(e) and 96 of the Code.

It also deals with a complaint by the International Longshoremen's Association, Local 1843 (ILA or the union), made subsequently, alleging violation of sections 94(1)(a), and 94(3) and 50 of the Code by HGEL. The section 50 complaint requires the consent in writing of the Minister of Labour pursuant to section 97(3) of the Code.

The four complaints by individuals were heard together on July 17 and 18 and on August 6 and 7, 1991. The evidence heard therein was recorded; and the Board ordered that the evidence be transferred to files 555-3252 and 585-420, which are pending before a differently constituted panel of the Board. (See Halifax Grain Elevator Limited (1991), 91 CLLC 16,033 (CLRB no. 867).)

That part of the ILA complaint dealing with unfair labour practices pursuant to sections 94(1)(a) and 94(3) of the Code, which did not require ministerial consent, was heard by the Board on August 7, 1991 via the transfer of the evidence already heard. No hearing was held with respect to the alleged violation of section 50 of the Code, because the consent in writing of the Minister had not been given as of the date of hearing.

II

The Facts

In October 1985, HGEL (then called Nosco Marine Industries Inc.) entered into a long-term lease with the Halifax Port Corporation (the former employer) for the operation of the grain elevators in the port of Halifax. HGEL thereby became bound, pursuant to section 44(2) of the Code, to the collective agreement in existence between the former employer and ILA (see Halifax Grain Elevator Limited, supra). That collective agreement expired December 31, 1989. At that time HGEL employed 38 employees. There are now 10 employees in the bargaining unit. After the expiration of the collective agreement and until February 1991, HGEL and ILA negotiated to enter into a new collective agreement. On February 13, 1991, ILA went on legal strike against HGEL after bargaining talks failed. On or about March 27, 1991, a tentative agreement was reached with the assistance of a Labour Canada conciliator. The four individual complainants were all members of the union negotiating committee.

On March 28, 1991, the employees returned to work at which time they were supposed to get their signing bonus cheques. HGEL insisted at that time that all employees sign an acknowledgement of having received four "company policies" before getting said cheques. One employee refused to sign the acknowledgement, and HGEL would not distribute the signing bonus cheques to anyone until he had signed.

The signing bonus cheques were then distributed to the employees; five employees, including the four individual

complainants, were also given lay-off notices with the lay-off to take effect immediately. The other employees were asked to remain in the office for instructions until HGEL received the collective agreement signed by the union. At noon, HGEL had still not received the signed collective agreement; it sent the employees home and cancelled the signing bonus cheques. As a result of these lay-offs, ILA resumed its strike which lasted until April 4, 1991 when another tentative agreement was reached, again with the assistance of Labour Canada.

All striking employees, including the four individual complainants, returned to work April 8, 1991.

Upon his return to work, on April 8, 1991, the complainant James Carr, a 14-year employee at the grain elevators, was not allowed to do his normal work on the bin floor. He was sent to do cleaning at the marine leg. Mr. Carr was handed a dirty safety hat that required washing and, because the hat's liner would take all day to dry, Mr. Carr asked for a second safety hat. Later, John Newman, former supervisor, appeared to get mad and tried to provoke Mr. Carr by saying: "Do you want to hit me now, boy?", presumably referring to an incident that allegedly happened on the picket line during the strike. Mr. Newman also gave Mr. Carr defective tools which impaired his ability to work. One day after returning to work, Mr. Carr was demoted from lead hand because, according to HGEL, of evidence he had given at an arbitration hearing held the previous year. Mr. Carr grieved this demotion and the grievance was still pending at the time of the hearing.

From April 8, 1991 until April 30, 1991, Mr. Carr was very

closely monitored by HGEL supervisory personnel to which we will return later in these reasons. On April 29, 1991, Mr. Carr received a letter of reprimand for alleged carelessness and neglect. On April 30, 1991, Mr. Carr was placed on sick leave by his doctor because of "stressful events causing acute anxiety" related to his situation at work.

The complainant Mark James, a 12-year employee at the grain elevators, was continually supervised by John Newman, former supervisor, and Curtis Murphy and Frank Bishop, alleged supervisory personnel of HGEL. He, along with the complainant Archie A. Howe and another employee, were forced to work under very severe conditions with minimal tools. On April 24, 1991, Mr. James received a letter of reprimand. On April 23, 1991, Mr. James visited his doctor who placed him on sick leave for work-related stress and gave him medication. The doctor gave him a letter for his employer. HGEL did not accept that letter and refused to pay sick leave until Mr. James obtained a second medical opinion, which he did. Mr. James was still on sick leave at the time of the hearing.

The complainant Archie A. Howe has been employed at the grain elevators for 22 years. As an experienced lead hand, he knows all the jobs and has trained most of the employees working there. His treatment by HGEL closely parallels that of Mark James. On April 8, 1991, upon returning to work, Mr. Howe was given boots and rain gear that were several sizes too large for him and sent to do some clean-up work. Like the others his work was continuously monitored by Curtis Murphy and Frank Bishop. The supervisors observed them at the site or from above with

spy glasses. One incident when Mr. Howe, Mr. James and another employee were cleaning Number 28 gallery, they had to carry five-gallon buckets of grain down a ramp about 100 feet long and at a 45 degree angle, and then another 300 feet to dump them. Curtis Murphy was beside them watching, walking up the ramp with the employees telling them to speed up. (He was all out of breath walking up the ramp without carrying anything.) This work is usually done by putting the grain on a conveyor belt and running it out of a spout into a container. Of the three employees, only the two on the negotiating committee, namely Archie A. Howe and Mark James, got letters of reprimand that they were not working fast enough.

Mr. Howe is a Canadian of African descent. He testified having heard John Newman making constant discriminating remarks. The extra supervision continued until, on April 25, 1991, Mr. Howe was placed on sick leave by his doctor for work-related stress.

On May 8, 1991, payday at HGEL, since James Carr, Mark James and Archie A. Howe were all on sick leave, they asked a fellow employee to pick up their pay cheque. Contrary to past practice, HGEL refused to release their pay cheques. The three complainants then tried to obtain the assistance of the Ports Canada police, which was informed that the employees would have to pick up their pay cheques in person; HGEL would not release their cheques to anyone else. In the afternoon of that day, the three complainants, accompanied by Carl Haley, union president, went to HGEL's administration office and picked up their pay cheques. As a result, the three complainants were each given a three-day suspension, to be served after they

returned from sick leave, for having put in an appearance at the administration office which HGEL claims is a violation of "policy number 4." According to that policy, an employee cannot go to the office without first having tried to settle his administrative problem with his superintendent who will make an appointment for the employee if he cannot answer the inquiry.

The complainant Reid William Hubley has been employed at the grain elevators for 22 years. In March 1989, he was promoted by HGEL to permanent quality control foreman. In June 1989, he was notified by HGEL that the quality control foreman position had become redundant and he returned to his former position of lead hand. Later in 1989 he was reassigned quality control duties and he was paid as quality control foreman until the strike on February 13, 1991.

Upon his return to work on April 8, 1991, Mr. Hubley was reassigned to the lower paid classification of elevator worker. Part of the work Mr. Hubley did is now being carried out by Curtis Murphy and Frank Bishop. These gentlemen are new supervisory employees, who had initially been hired among others as replacement workers during the legal strike. They were retained at the end of the strike allegedly as supervisory employees. According to the evidence concerning the work carried out by the two gentlemen and the uncontradicted written submissions of the complainants, they are at most lead hands.

Another part of the work formerly performed by Mr. Hubley (pest control) is now performed by an independent contractor. HGEL explained, through its president J.E.

Oakley, that the demotion is due to the fact that the federal government had eliminated the "At-East Rail Subsidy" and that Mr. Hubley was not licensed to apply chemical fumigants. Mr. Hubley was never advised nor given the opportunity to become licensed for this purpose.

Finally, let us mention that HGEL has reissued the five lay-off notices which had precipitated the resumption of the strike. The notices are still outstanding and, according to Mr. Oakley, they will become effective once the affected employees return to work from their sick leave.

### III

#### Parties' Submissions

According to the employer, all the elements complained of arise out of operational requirements and not out of any anti-union animus. At the outset of the hearing, the employer also submitted that all the complaints ought to be deferred to the grievance procedure provided in the collective agreement pursuant to section 98(3) of the Code. The Board declined to do so after having considered the collective agreement between the parties as well as the relevant case law. (See Bell Canada (1977), 20 di 356; [1978] 1 Can LRBR 1; and 78 CLLC 16,126 (CLRB no. 97); and Maritime Employers' Association (1987), 69 di 41; 17 CLRBR (NS) 355 (CLRB no. 617).)

According to the complainants, the employer's practices complained of are unheard of and definitely arise out of anti-union animus. The complainants request the Board to scrutinize the employer's behaviour closely and to order

the appropriate remedies.

IV

Decision

The relevant provisions of the Code read as follows:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

...

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

...

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

(b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part;

...

(e) seek, by intimidation, threat of dismissal or any kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

...

98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

The Board's approach to cases alleging violations of the aforesaid sections of the Code has been stated in its often quoted decision in Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82):

"... The employment relationship is a continuous, often long term, relationship. As in all human relationships, it is often far from perfect with either party having cause for some dissatisfaction. At any point in time employers can often point to past or recent employee behaviour or inadequacies to justify a termination or change in the terms of the relationship. (Indeed, at common law it is an at-will relationship terminable without cause if adequate notice or pay in lieu of notice is given.) It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-

discriminatory reasons for his act.

*For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is one contemplated by section 184(3), he will be found to have committed an unfair labour practice."*

(pages 284-285; and 461; emphasis added)

In this case, because section 98(4) places the burden of proof on the employer, it must provide to the Board an explanation for its actions which, on the balance of probabilities, will satisfy the Board that no anti-union animus is present in its decision to take these actions against employees which are covered by section 94(3) of the Code.

The evidence presented by HGEL, measured against the uncontradicted evidence produced by the complainants, fails to discharge this burden. This in itself would be sufficient for the Board to allow the complaints. However, the employer's failure to offer evidence by its alleged supervisory personnel directly involved in contradiction of the complainants' evidence, coupled with the steadily deteriorating relations between HGEL and the union, convince the Board that HGEL's actions are tainted by anti-union animus. It is hard if not impossible to view the provocation, the racist comments, the slave-driving and the excessive supervision, which the evidence disclosed, as anything other than what is prohibited by section 94(3)(a) of the Code, that is discrimination and intimidation. Consequently, we must find that the individual complainants had to take sick leave because of the stress caused by the behaviour of the employer through its alleged supervisory personnel.

For the above reasons, the complaints are allowed.

V

Remedial Orders

Pursuant to section 99 of the Code, the Board therefore makes the following orders.

Halifax Grain Elevator Limited shall

1. cease and desist from harassing and intimidating complainants James Carr, Mark D. James, Archie A. Howe and Reid William Hubley;
2. rescind all disciplinary actions taken or announced in respect of complainants James Carr, Mark D. James and Archie A. Howe, and expunge such disciplinary actions from their respective employment records;
3. reinstate complainant James Carr to his former classification of lead hand as of April 8, 1991;
4. pay complainant James Carr the difference between the compensation he actually received and what he would have earned as lead hand from April 8, 1991 to date of payment;
5. reinstate the full number of accumulated sick leave days which complainants James Carr, Mark D. James, Archie A. Howe and Reid William Hubley had to their credit as of April 8, 1991;

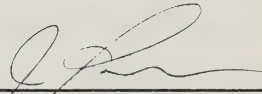
6. pay complainant Mark D. James the days of work that he missed because of sickness after the end of his accumulated sick leave days (Mr. James will reimburse U.I.C.);
7. restore any seniority which complainants James Carr, Mark D. James, Archie A. Howe and Reid William Hubley may have lost as a result of having to take sick leave;
8. reinstate complainant Reid William Hubley to his former classification of foreman quality control as of April 8, 1991, until he becomes licensed by the Department of Environment to apply fumigants or until it becomes clear, after having had an opportunity to become licensed, that he cannot become so licensed;
9. pay complainant Reid William Hubley the difference between the compensation he actually received and what he would have earned as foreman quality control from April 8, 1991 to date of payment;
10. cease and desist from contravening section 94 of the Code with respect to all its employees who are members of ILA Local 1843;
11. rescind all lay-off notices previously issued, and engage forthwith with the union in consultations with respect to any proposed lay-off and alterations of manning requirements.

The Board shall retain jurisdiction concerning any matter which may arise in implementing these orders and appoints Mr. John Vines, director of its Atlantic regional office, or any person he may designate, to assist the parties, as required.



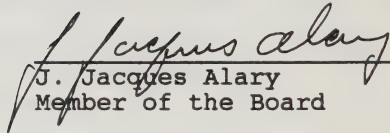
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Serge Brault  
Vice-Chair



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J. Philippe Morneau  
Vice-Chair



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J. Jacques Alary  
Member of the Board

ISSUED at Ottawa, this 22nd            day of October 1991.

# information

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## Summary

STAN BUTLER, COMPLAINANT, AND  
VERSPEETEN CARTAGE LTD.,  
RESPONDENT EMPLOYER.

## Résumé de Décision

STAN BUTLER, PLAIGNANT, ET  
VERSPEETEN CARTAGE LTD.,  
EMPLOYEUR INTIMÉ.

Board File: 950-196

Dossier du Conseil: 950-196

Decision No.: 899

No de Décision: 899

The Board found that Verspeeten Cartage Ltd. had violated section 147(a) of the Canada Labour code (Part II - Occupational Safety and Health) when it dismissed an employee who had refused to drive a certain truck because he felt a mattress in its sleeper berth was so filthy as to be a danger to his health. The Board concluded that, whether or not objectively the mattress was a "danger" within the meaning of the Code, the employee did have "reasonable cause to believe" that it posed a hazard to his health and that the employer had erred in not following the steps required by the Code, particularly in not investigating the refusal to work, and had breached the law in dismissing the man for exercising his "right to refuse".

Le Conseil a jugé que Verspeeten Cartage Ltd. avait enfreint l'alinéa 147a) du Code canadien du travail (Sécurité et santé au travail). Selon la plainte, l'employeur avait congédié un employé qui avait refusé de conduire un camion parce que, à son avis, le matelas dans la couchette était si malpropre qu'il constituait un danger pour sa santé. Le Conseil a conclu que, peu importe que le matelas constituait ou non objectivement un «danger» au sens du Code, l'employé avait de bonnes raisons de croire que le matelas constituait en fait un danger pour sa santé. Il a conclu également que l'employeur avait commis une erreur en n'observant pas la marche à suivre prévue par le Code, et surtout en ne faisant pas enquête, et qu'il avait enfreint la loi en congédiant le plaignant pour avoir exercé son droit de refuser de travailler.

The Board ordered that the employee be reinstated in employment and compensated for lost remuneration.

Le Conseil a ordonné à l'employeur de réintégrer l'employé dans ses fonctions et de le dédommager pour toute perte de salaire.



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Reasons for Decision

Stan Butler,  
*complainant,*  
*and*  
Verspeeten Cartage Ltd.,  
*respondent employer.*

Board File: 950-196

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The Board consisted of Vice-Chairman Thomas M. Eberlee, sitting as a single member quorum pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Stan Butler, the complainant, on his own behalf; and  
Robert B. Budd, for the respondent employer.

I

Stan Butler was a driver for Verspeeten Cartage Ltd. of Tillsonburg, Ontario, until he was dismissed effective April 26, 1991. He complained to the Board on June 25, 1991 that the dismissal constituted a violation of section 147(a) of the Code, which reads as follows:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

*(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,*

*(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or*

*(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."*

A hearing was held in London, Ontario, on October 1 and 2, 1991.

## II

At the outset of the hearing, by way of a preliminary objection, counsel for the employer argued that the Board should immediately dismiss the complaint on the ground that Mr. Butler had failed to follow certain steps set out in section 133 of the Code which are required to be taken before a complaint may actually be made. The Board ruled that the question of whether or not Mr. Butler had taken these steps could only be answered once the Board had been provided with a sufficient factual picture.

It was then understood, or at least accepted by both parties, that the employer, pursuant to the procedure deriving from section 133(6) of the Code, which reads as follows:

*"133.(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party."*

would answer the complaint in toto and, in the process,

would present its version of the facts having to do with the preliminary objection. The complainant would then seek to make his case. And, finally, the employer would reply.

Thus, the preliminary objection was left to be dealt with by the Board in the context of its ultimate disposition of the matter. This decision, then, sets out the fact picture, as the Board sees it, elaborates on the employer's preliminary objection, makes a finding with respect to that objection, and goes on to outline the Board's determination of the complaint.

### III

Verspeeten Cartage Ltd. is a family-owned, interprovincial and international contract carrier of general commodities. It employs some 110 persons and owns 96 tractors and 250 trailers. It is non-union.

Mr. Butler was employed by Verspeeten Cartage for more than 10 years. A few days before the events which precipitated his dismissal, he was involved in a motor vehicle accident - which apparently did not figure in his dismissal - and the vehicle he normally drove was taken off the road for repairs. Without his usual vehicle, he was expected to drive whatever tractor unit was assigned to him.

On April 18, 1991, Mr. Butler drove Unit 80. He noted that the mattress in the cab's sleeper berth appeared to be extremely dirty. He testified that he believed it might actually be a source of infection. When he returned to the terminal he complained verbally to dispatchers Mark

Verspeeten and Gary Sobry about the "filthy condition" of the sleeper berth of the unit, that it was a hazard to his health and that he would not drive the vehicle again until this condition had improved. He testified that he advised dispatch of the condition of the sleeper berth mattress - its appearance, its horrible smell, that its dirt was "grotesque" and that it made him fear for his health if he used it. This testimony was not contradicted by other evidence; the Board accepts Mr. Butler's account.

The dispatchers are the link between a driver and the employer. When a driver reports something to a dispatcher, he is in fact reporting it to the employer. The evidence indicates, however, that the dispatchers reacted to Mr. Butler's complaint only to the extent of passing on to the higher-ups in the company, some time later, a message that Mr. Butler was refusing to drive Unit 80, accompanied by no explanation as to why he was refusing. Nobody in authority felt prompted to look into the situation to see what it was really all about.

On April 19, 1991, Mr. Butler was dispatched with another unit and no complaints ensued.

However, when he went into the terminal for his assignment on Monday, April 22, 1991, he was directed by dispatcher Jack Briet to take Unit 80. Mr. Butler told the Board that the condition of this cab had not improved since April 18, so he advised Mr. Briet he would go home before he would drive it. He also told Mr. Briet that he had complained five days earlier about the vehicle's condition. Again, there was no evidence adduced before the Board to contradict Mr. Butler's account of this conversation and

the Board accepts it as factual.

Mr. Briet told Mr. Butler to drive Unit 105 instead of Unit 80. Mr. Butler inspected this vehicle and reported that the headlights were not working. A shift change had occurred and another dispatcher, Gary Sobry, then assigned him to Unit 106.

On Tuesday morning, April 23, 1991. when Mr. Butler reported for work, he was assigned Unit 80 by operations manager Alan Verspeeten. Mr. Butler testified that the condition of the mattress in the sleeping compartment had not improved and that, after inspecting it, he went back into the terminal office and told Mr. Verspeeten he would not drive the unit since it would endanger his health and safety.

Mr. Verspeeten testified that he had "not really" been advised by anybody about the cause of Mr. Butler's concern. He told the Board that no dispatcher had actually explained why Mr. Butler had refused to drive Unit 80. He had inspected Unit 80 before Mr. Butler arrived on April 23 (which seems to suggest that some part of the Butler message had penetrated to top management); he had looked in the cab and had noted that it was dusty. But he had not looked into the sleeper area. He testified that Mr. Butler made no mention to him of his reason for refusing to drive Unit 80. There was no mention of any danger to health or safety and no reference to the mattress. Mr. Verspeeten told Mr. Butler that no other vehicle was available for him and, if he would not drive Unit 80, he would have to go home.

Mr. Verspeeten conceded that he did not ask Mr. Butler for an explanation of his reason for refusing to drive the particular unit. He told the Board that he did not need to ask Mr. Butler to explain the problem. He already knew that Mr. Butler had "no legitimate reason" for not driving Unit 80. He knew, without having to ask, that the only reason Mr. Butler didn't want to drive Unit 80 was because it was not a new truck like the one he was used to driving.

Mr. Butler then asked to speak to Ronald Verspeeten, the vice-president of operations and traffic. The latter testified that Mr. Butler told him he would not drive the truck because it was dirty. He said Mr. Butler made no mention of his specific concern but he (Mr. Verspeeten) did not probe farther to see what Mr. Butler actually meant. Mr. Butler asked him if the company would pay him (Mr. Butler) for time spent in cleaning the cab. Mr. Verspeeten agreed. According to Alan Verspeeten, Mr. Butler's conversation with Ronald Verspeeten lasted about 15 minutes. He was not present for it so he was unable to say what was discussed. But if the conversation lasted 15 minutes it seems incredible that it did not get to the real point of Mr. Butler's problem. Mr. Butler, on the other hand, testified that it did. Ronald Verspeeten did not speak to Mr. Butler again that day, although he inspected the truck later and told the Board it appeared to be in good shape. He testified that he did not look into the sleeper berth.

According to Alan Verspeeten, Mr. Butler spent only a few minutes working on the truck. Then Mr. Butler came and told him (Alan Verspeeten) that he was not going to continue. According to Mr. Verspeeten, Mr. Butler gave no

reason.

Mr. Butler testified that he attempted to clean the vehicle. He inspected the mattress in the sleeper berth more closely than he had done before. It was filthy, covered with mold and mildew. It seemed obvious to him that it was a hazard to his health. He felt sure that any contact with it would cause a risk of infection. He felt it was impossible for him to clean it. After so advising Alan Verspeeten, he went home because there was no other vehicle for him to drive.

According to Mr. Butler, before he departed the terminal on the morning of April 23, having refused to drive Unit 80 because he believed the condition of the sleeper berth - which he might have had to use if he had driven beyond a certain number of hours - was a hazard to his health, he asked for assistance from Steve Wilson, a fellow employee, whom he understood to be a member of the safety and health committee. According to Mr. Butler, Mr. Wilson declined to express an opinion about the condition of the sleeper berth and, in effect, refused to assist him. In the absence of any evidence to the contrary, the Board accepts Mr. Butler's testimony that the situation was brought to the attention of a member of the safety and health committee.

Mr. Butler was sick on April 24 and his wife advised dispatch that he would not be able to work. That day or the next, he contacted Labour Canada about the problem as he saw it. He told the Board that a Labour Canada officer outlined the steps that should be taken by an employer and an employee under the Code when an employee refuses to work

in a situation which he believes to be a danger to himself.

Mr. Butler testified that he called dispatch during the afternoon of April 25 and was told to come in to see vice-president Ronald Verspeeten at 10:00 a.m. the following morning. Meanwhile, the latter had prepared a letter of dismissal dated April 25, 1991. It made reference to Mr. Butler's statement on April 23 that Unit 80 was not clean enough inside which again indicates that part of Mr. Butler's message was received by upper management. Mr. Verspeeten's testimony at the hearing was to the effect, however, that he interpreted Mr. Butler's refusal to drive that unit, not as a health and safety question, but rather as a refusal of dispatch, part of a "constant disregard for Company Policy" - as the dismissal letter suggests.

When the two met on April 26, Mr. Verspeeten gave Mr. Butler the dismissal letter. In response to questioning by the Board about any discussion that might have taken place during this encounter, Mr. Verspeeten stated that he refused to allow Mr. Butler to say anything on his own behalf.

#### IV

Section 147(a), which Mr. Butler has claimed was violated by Verspeeten Cartage when it dismissed him, has already been quoted. In essence, Mr. Butler's complaint is that the employer dismissed him because he invoked section 128(1) of the Code, which reads as follows:

*"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that*

*(a) the use or operation of a machine or thing constitutes a danger to the employee*

or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

"Danger" is defined in section 122(1) of the Code as:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

An employee who invokes the right to refuse under section 128(1) is bound under section 128(6) to report forthwith the "circumstances of the matter":

"128.(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

b) the safety and health representative, if any, appointed for the work place affected."

Then, section 128(7) obliges the employer to investigate the matter:

"128.(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health representative has been

*established or appointed for the work place affected, at least one person selected by the employee."*

It is not the employer who makes the final decision about the existence or non-existence of danger. Section 128(8) allows an employee, who continues to believe that danger exists, to continue to refuse to "use or operate the machine or thing or to work in that place." Only a "safety officer", within the meaning of the Code, is then empowered to decide whether or not there is danger. Sections 129(1) and (2) provide as follows:

*"129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.*

*(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not*

*(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or*

*(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),*

*and he shall forthwith notify the employer and the employee of his decision."*

Under section 130, the Board is mandated to confirm or not confirm a safety officer's decision and in the latter case to issue appropriate directions to correct the situation, but only where a safety officer decides that "danger" does not exist. If a safety officer agrees that there is danger, an appeal lies to a "regional safety officer", not

to the Board.

The provision of the Code which governs the making of complaints to the Board alleging illegal employer action against an employee who has invoked the right to refuse provisions of sections 128 and 129 is section 133. The portions of that section which are immediately relevant to this matter are paragraphs (1), (2) and (3) which read as follows:

*"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

*(2) A complaint made pursuant to subsection (1) shall be made to the Board not later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.*

*(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint."*

Reference was made, beginning on page two, to the preliminary objection raised by the employer. It was argued that Mr. Butler could not make a complaint because he had failed to comply with section 128(6) or 129(1) as required in section 133(3). With respect to the requirements of section 128(6), there is no doubt that he did report to the employer that he was refusing to drive Unit 80. He did so on April 18, April 22 and April 23. He also reported the "circumstances" to the employer on April 18 and 22, through the dispatchers, and he sought

again on April 23 to convey this message to Messrs. Ronald and Alan Verspeeten. That they apparently did not appreciate the full and precise import of what Mr. Butler was trying to convey to them must have been due to their admitted failure to probe Mr. Butler about what his refusal to drive Unit 80 was really all about. Instead, as Mr. Alan Verspeeten indicated at the hearing, they simply jumped to a conclusion which was adverse to Mr. Butler.

The evidence also shows that Mr. Butler satisfied the other requirement of section 128(6). He did report the matter to a member of the safety and health committee, Mr. Wilson, who declined to become involved. In the light of the fact that the safety and health committee at Verspeeten Cartage was actually only something on paper at the time, the Board would have had a hard time to justify refusing Mr. Butler's complaint even without his having actually reported the matter to a member of the committee. The committee, which Verspeeten Cartage was required under the law to establish and take seriously, was simply not operative in April, 1991. While its members had been selected in January or February, 1991, according to correspondence filed with the Board by the company itself, it did not actually meet for the first time and become operative in any sense until May 27, 1991, a month or so after Mr. Butler was fired.

Section 128(7) was quoted on page nine. After the requisite reports are made, an employer is required to investigate. The evidence shows that while one or other of the Verspeeten's looked into the cab and saw it was dusty or was not dusty, as the case may be, the sleeping

berth and the mattress escaped attention. And in spite of the fact that the condition of the mattress in the sleeping berth was central to Mr. Butler's complaint, which fact had been reported by him to the employer via his statements to dispatch beginning on April 18, not to mention in other statements, this continued not to receive the attention of senior management. The latter sought at the hearing to have the Board believe that they simply did not know what the fuss was all about because Mr. Butler did not say directly to them precisely what was bothering him, didn't ask them directly to go out and look at the sleeping berth, or didn't drag the filthy mattress into their office and plop it on their desks. Even assuming that their recollections, as outlined in their testimony, were accurate, and that Mr. Butler's memory of having actually told them that he was concerned about the mattress was flawed, it was still their responsibility to initiate an investigation into the report Mr. Butler had made to the employer via dispatch - however vague their own understanding of that report may have been. The Board finds that the employer did not investigate the matter as required under section 128(7).

The employer also made no effort to call in a safety officer, as is contemplated under section 129(1) to make a determination as to whether the matter did involve danger within the meaning of the Code. For his part, Mr. Butler did contact Labour Canada but, for whatever reason, a safety officer did not appear immediately on the scene to investigate the matter before Mr. Butler was dismissed.

V

The employer maintained that Mr. Butler was terminated for failure to accept dispatch and to follow company policy and because of his past record. The company argued that Mr. Butler and the other drivers were responsible for keeping the cabs of vehicles clean and thus the situation Mr. Butler had complained about was his responsibility to correct. Moreover, the company had agreed to pay him to correct it, had given him all the time he needed, but he had spent only a few minutes cleaning out the vehicle and had then refused to continue and had gone home, thus abandoning his job. It was also suggested that the real reason behind Mr. Butler's refusal to drive Unit 80 was that he wanted to be assigned to a newer truck.

The Board will never be able to know objectively whether the mattress in Unit 80 was in the state described by Mr. Butler and whether it did in fact constitute a "danger" within the meaning of the Code. This is largely because no safety officer came on the scene to investigate the situation, although Mr. Butler did call Labour Canada before he was fired. However, there was no evidence presented to the Board which challenged Mr. Butler's subjective view of the mattress. The claim to the effect that he invented the story for some other purpose, such as to avoid having to drive an older vehicle - which apparently Unit 80 was - was presented as an unsupported assertion and does not deserve credence.

The Board has no reason not to accept that Mr. Butler really perceived the mattress to be moldy, filthy and a carrier of infection, a danger to his health if he had to rest upon it, and that he could not properly clean it with the tools at hand. Undoubtedly he had "reasonable cause to believe" that danger was present and this explained his refusal to drive Unit 80. Thus, while he did refuse to accept dispatch, he did have a legitimate reason in that the refusal was based on the exercise of his right established under section 128 of the Code.

One of the company's safety rules, contained at page 5 of its safety and operating manual which is dated January 2, 1991, and which was drawn to the Board's attention by counsel for the employer, reads as follows:

*"5. Employees must maintain their workplace in a safe condition and remove any foreign objects or materials which may not allow them to perform their job safely. This includes keeping all company vehicles clean inside at all times."*

The issue here, according to the Board's assessment of the facts, is that Mr. Butler perceived the condition of the mattress in the sleeping berth to be beyond what he as an employee could deal with, even on the basis of a conscientious application of the foregoing rule. Only the employer had the means to ensure that the thing was appropriately cleaned, or more likely, replaced.

This rule, however reasonable - and of course it is reasonable - does not, however, lessen the employer's general responsibility under the Code to ensure that danger to an employee does not exist. Nor can it be applied so as to dilute or reduce in any way an employee's right to invoke section 128(1) without reprisal.

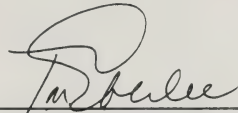
The Board concludes that by dismissing Mr. Butler, Verspeeten Cartage Ltd. did take action against him in contravention of section 147(a) of the Code because he acted in accordance with section 128.

## VI

Under the remedial powers of section 134, the Board orders Verspeeten Cartage Ltd. to

1. reinstate Mr. Butler in his previous employment within 10 days of the date of this decision and
2. to pay to him within 30 days of the date of this decision compensation equal to the remuneration he would have earned between his dismissal on April 26, 1991 and the date of his return to employment, such compensation to be calculated on the basis of the amount he earned in the same period in 1990 increased by the rise in the national consumer price index between the end of April, 1990 and the end of April, 1991.

The Board appoints Peter Suchanek, regional director and registrar for Ontario, or such person as may be designated by him, to assist the parties to implement the foregoing remedies. The Board will remain seized of the matter in order to determine any questions that may arise or to issue a formal order should such become necessary.

A handwritten signature in dark ink, appearing to read 'T. Eberlee', is written over a horizontal line.

Thomas M. Eberlee  
Vice-Chairman

DATED at Ottawa this 23rd day of October, 1991.



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## Summary

CANADIAN BROTHERHOOD OF RAILWAY,  
TRANSPORT AND GENERAL WORKERS ON  
BEHALF OF ANDREW KELLY, COMPLAINANT,  
AND CLIPPER NAVIGATION LIMITED,  
RESPONDENT.

Board File: 745-3991

Decision No.: 900

## Résumé de Décision

LA FRATERNITÉ CANADIENNE DES  
CHEMINOTS, EMPLOYÉS DES TRANSPORTS ET  
AUTRES OUVRIERS, AU NOM DE ANDREW  
KELLY, PLAIGNANTE, ET CLIPPER  
NAVIGATION LIMITED, INTIMÉE.

Dossier du Conseil: 745-3991

Décision n° 900

These reasons deal with an unfair  
labour practice complaint against  
Clipper Navigation Limited for having  
allegedly terminated the employment  
of Andrew Kelly contrary to section  
94(3)(a)(i) of the Canada Labour Code  
(Part I - Industrial Relations).

"94.(3) No employer or person acting  
on behalf of an employer shall

(a) refuse to employ or to continue  
to employ or suspend, transfer, lay  
off or otherwise discriminate against  
any person with respect to employment,  
pay or any other term or condition of  
employment or intimidate, threaten or  
otherwise discipline any person,  
because the person

(i) is or proposes to become, or seeks  
to induce any other person to become,  
a member, officer or representative  
of a trade union or participates in  
the promotion, formation or  
administration of a trade union,..."

The complaint was allowed. In its  
reasons the Board highlights its  
policy of proximate cause and, while  
there was no direct evidence to  
support the allegation, the Board  
found several circumstances from which  
anti-union animus was inferred in  
light of the coincidental exercise of  
employee rights under the Code.

Il s'agit ici d'une plainte de  
pratique déloyale de travail déposée  
contre Clipper Navigation Limited pour  
avoir présumément congédié Andrew  
Kelly en violation du sous-alinéa  
94(3)(a)(i) du Code canadien du  
travail (Partie I - Relations du  
travail):

"94.(3) Il est interdit à tout  
employeur et à quiconque agit pour  
son compte:

(a) de refuser d'employer ou de  
continuer à employer une personne, ou  
encore de la suspendre, muter ou  
mettre à pied, ou de faire à son égard  
des distinctions injustes en matière  
d'emploi, de salaire ou d'autres  
conditions d'emploi, de l'intimider,  
de la menacer ou de prendre d'autres  
mesures disciplinaires à son encontre  
pour l'un ou l'autre des motifs  
suivants:

(i) elle adhère à un syndicat ou en  
est un dirigeant ou représentant - ou  
se propose de le faire ou de le  
devenir, ou incite une autre personne  
à le faire ou à le devenir - , ou  
contribue à la formation, la promotion  
ou l'administration d'un syndicat,..."

La plainte est accueillie. Dans ses  
motifs, le Conseil fait ressortir sa  
politique de cause immédiate. Bien  
qu'il n'y ait pas de preuve directe  
pour étayer l'allégation, le Conseil  
a décelé plusieurs incidents à partir  
desquels on peut déduire que  
l'employeur a fait preuve de sentiment  
antisyndical compte tenu du fait que  
l'employé exerçait à ce moment-là des  
droits prévus par le Code.



As a remedy the Board ordered that the employer comply with the Code and reinstate Andrew Kelly immediately in its employment with compensation for lost wages and benefits.

En guise de redressement, le Conseil ordonne à l'employeur de se conformer au Code, de réintégrer immédiatement Andrew Kelly dans ses fonctions et de le dédommager pour toute perte de salaire et d'avantages sociaux.

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Conseil  
Canadien des  
Relations du  
Travail

Reasons for decision

Canadian Brotherhood of Railway,  
Transport and General Workers on  
behalf of

Andrew Kelly,

*complainant,*

and

Clipper Navigation Limited,

*respondent.*

Board File: 745-3991

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The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair and Members Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Messrs. Crispian D. Starkey and Peter Golden, for the complainant; and

Mr. Lewis L. Ellsworth, for the respondent.

I

This complaint of unfair labour practice against Clipper Navigation Limited (the employer) was filed by the Canadian Brotherhood of Railway, Transport and General Workers (CBRT & GW or the union) on July 29, 1991. The allegation in the complaint is that the employer terminated the employment of Andrew Kelly because of his involvement in an organizing campaign among the employees of the employer by the CBRT & GW which eventually led to the union being certified as the bargaining agent for a bargaining unit described as:

*"all reservation, dock and baggage handling staff employed by Clipper Navigation Limited, Victoria, B.C., excluding the terminal manager and those above"*

The union filed its application for certification on May 31, 1991 and the Board issued the above described certification order on July 25, 1991. Andrew Kelly joined the union on May 26, 1991. His employment was terminated on July 11, 1991.

The employer denied the allegations and, attempts by a Board Officer to assist the parties to settle the matter being to no avail, the Board heard the complaint at Victoria on October 10 and 11, 1991.

## II

The employer is registered as a company under the Company Act of the Province of British Columbia and operates terminal facilities at Victoria for vessels operated by Clipper Navigation Inc., its owners. Clipper Navigation Inc. is a United States, State of Washington corporation which is in the business of operating a jet catamaran passenger service between Seattle and Victoria. Depending on seasonal demands the employer services from one to four international landings and departures daily at its facilities at Victoria harbour. For these purposes the employer employs some five dockhands and seven reservation agents who work under the direction of a terminal manager, Ms. Catherine Wollner. Ms. Wollner is answerable to Clipper

Navigation Inc.'s Vice-President and General Manager, Mr. Darrell Bryan.

This direct reporting line from Ms. Wollner to Mr. Bryan was only just created in May 1991 as a response to signs of severe unrest amongst the employees at Victoria, including Ms. Wollner. This unrest was apparently caused by the authoritarian attitude of a Seattle supervisor who oversaw the Victoria operations. The atmosphere became so bad that Catherine Wollner submitted her resignation on May 7, 1991 which she intended to take effect on May 22, 1991. Mr. Bryan responded by meeting with Ms. Wollner and promising changes which would result in better communications between Seattle and Victoria and improved working conditions for the Canadian employees. As we mentioned, the direct reporting line between Ms. Wollner and Mr. Bryan was seen as one way to ease the tension and unrest amongst the employees at Victoria. Another suggestion which was discussed between Ms. Wollner and Mr. Bryan was to arrange a meeting between Mr. Bryan and the employees where all of their perceived grievances could be aired. There was, however, no date set for this meeting; there was only a consensus that it should be done before the summer schedule took effect near the middle of June.

In the meantime, the employees were taking their own initiatives to counter what they saw as shoddy treatment from Seattle. They approached the CBRT & GW for representation to bargain collectively with the employer. Andrew Kelly was the instigator of this approach to the union which resulted in a meeting between CBRT & GW representatives and the employees on

May 26, 1991. At that meeting most of the employees signed membership cards which in turn led to the union's application for certification to the Board on May 31, 1991. Before the application was filed, however, two employees told Catherine Wollner what they were up to. She, out of a sense of loyalty to the employer, told Mr. Bryan that something was going on. This was a grey area in the testimony and it never did become clear as to what Ms. Wollner actually said to Mr. Bryan. The importance of this is diminished, however, because Mr. Bryan did tell the Board quite candidly that although Ms. Wollner never mentioned the CBRT & GW, he immediately surmised that the employees were unionizing.

Immediately upon the employer learning about the union activities, the proposed meeting between Mr. Bryan and the employees which had been discussed but never set was speedily arranged for May 30, 1991. It consisted of a dinner meeting which was held at Victoria at the employer's expense. Employees who testified before the Board said that while no one actually said so when they were notified about the meeting by word of mouth, they felt that their attendance was mandatory.

Many topics were discussed at this meeting including the concerns of the employees for improved conditions of employment in areas such as wages, uniforms, rain gear, more staff, and mechanized equipment for moving baggage bins. Mr. Bryan also made a presentation about the growth of the company in the past few years and its potential in the future. Throughout these discussions, Andrew Kelly, who had just been elected as shop steward by the employee group, carried the conversation on behalf of the employees. At one stage of the exchanges

between Messrs. Bryan and Kelly tempers flared and Mr. Bryan blurted out that Kelly was nothing but a union grievor. Shortly after this, Andrew Kelly walked out of the meeting.

A few weeks later, on June 29, 1991 an incident occurred at the Victoria waterfront involving a bin of passengers' baggage which was mistakenly reloaded aboard a vessel and returned to Seattle instead of being held on the dock for distribution to passengers. This apparently caused quite a commotion among the irate passengers, some of whom did not receive their baggage until the next morning. According to the employer, this incident cost some \$2,592.40 U.S. funds in compensation awards to the 39 affected passengers.

Andrew Kelly was singled out and blamed for this mishap and he was fired on July 11, 1991. In his testimony before the Board, Mr. Bryan explained how he had investigated the circumstances surrounding the baggage incident and, while he conceded that Andrew Kelly had not actually reloaded the luggage bin back on the vessel, he said that the statements he had obtained from all of those involved clearly exonerated everyone from culpability except Andrew Kelly. It was the employer's position that its well-known policy of providing personal and top quality service to its passengers was its life blood and that errors of this magnitude could not go unpunished. Mr. Bryan was adamant that he was not aware of Andrew Kelly's particular involvement with the union. He also claimed that the union activity amongst the employees had nothing whatsoever to do with his decision to fire Andrew Kelly.

III

While the union referred to several sections of the Code in its complaint the relevant provisions are obviously section 94(3)(a)(i) which provides:

*"94.(3) No employer or person acting on behalf of an employer shall*

*(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person*

*(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,"*

The Board's approach to this type of complaint was summarized recently in General Truck Drivers and Helpers, Teamsters Local Union 31 on behalf of Michael Bloski et al. unreported Board decision no. 885 dated July 30, 1991.

*"If the exercise of employee rights under the Code is the catalyst in any way, shape or form for action taken against employees then the employer will be found to have violated the Code. Furthermore, there is a burden placed upon employers by section 98(4) of the Code whereby the onus is on an employer to satisfy the Board that any action taken against employees is free of anti-union animus. Obviously, when employees are suddenly let go just after they have joined a union as happened here, this burden of proof becomes even more onerous. For an overview of these principles, see Northern Cruiser Limited (1990), unreported Board decision no. 828; Emery Worldwide (1990), unreported Board decision no. 775; and Air Atlantic (1986), 68 di 30; and 87 16,002 (CLRB no. 600)."*

(page 7; emphasis added)

Like most other cases of this nature, there is no direct evidence to substantiate the union's claims that the employer's conduct was motivated entirely or at least in part by its resistance to the collective bargaining principles enshrined in the Code. It is therefore necessary for the Board to sift through the particular facts to see if there are inferences which can be drawn which point to any taint of anti-union animus.

In this case there are several areas of the employer's presentation which, in normal circumstances, might appear to be a plausible defence against just cause dismissal; however, when taken in light of the coincidental exercise of the employees' rights under the Code to opt for participation in collective bargaining, they arouse suspicions of anti-union motives.

First, there is Andrew Kelly's past work record. He was employed as a dockhand by the employer from April 16, 1990 and it was conceded by the employer that he had always been a valued employee. He was seen as a leader amongst the other employees and the employer relied upon him to train newcomers. His diligence and dedication had been rewarded by his receipt of the highest wage rate amongst the dockhands. Andrew Kelly's work record was clear of any form of disciplinary action. For this valued employee to be suddenly let go just after he had joined the union and had been elected as shop steward is enough in itself to arouse suspicions.

While it is not the Board's role in these situations to judge whether there was just cause to warrant dismissal, it is useful at times to look at the allegations against

the dismissed employee to ascertain if there are some reasonable bases for the employer's actions. If there are no reasonable or prima facie bases, then inferences can be drawn as to the true motives behind the dismissal. Here, Andrew Kelly was not even in the immediate vicinity during the unfortunate reloading of the luggage bin on June 29, 1991. There were three other persons more directly involved. These were the dockhand who actually loaded the bin, the crew member on the vessel who received the bin and who lashed it down and the ship's officer who had the responsibility for checking that the bins were secure before departure. All of these people were in a much better position to have noticed the wrong coloured tag on the bin. These different coloured tags are intended to designate where the bins are to be unloaded.

To have singled out Andrew Kelly in these circumstances and to have fired him without any thought of progressive discipline seems to be so unreasonable that it suggests to us that there were other motives behind the dismissal. If this had been done at the time in the heat of the moment amidst the commotion created by the irate passengers whose luggage had gone astray, one could have perhaps understood such an emotional response but this was not so. The firing came about almost two weeks later when everyone had time to cool down. In light of the questionable facts upon which the employer relied to justify the termination of Andrew Kelly's employment, strong suspicions are aroused that there was more to it than the employer is willing to admit. Again, the coincidental exercise of the employees' right under the Code stands out as one of the obvious catalysts for the employer's conduct.

Taking into account the heated exchange between Andrew Kelly and Mr. Bryan at the meeting on May 30, 1991 just after the employer became aware of the union activities and Mr. Bryan's reference to Kelly being a union grievor, we find it difficult to accept Mr. Bryan's claim to clean hands vis-à-vis anti-union animus. His attempt to explain away the use of the term union grievor as common railroad jargon from his past employment rang hollow to our ears. From the circumstances and on the balance of probabilities we can only draw the inference that Mr. Bryan was fully aware of Andrew Kelly's role in the union organizing campaign and that this had a lot to do with his firing.

In addition, there were questions in our minds about the true purpose of the employer calling the meeting with the employees on May 30, 1991 which conveniently provided Mr. Bryan with an opportunity to address them collectively just after they had opted for collective bargaining. Much has been written about "captive audience" meetings with employees where employers have attempted, either subtly or otherwise, to influence employees by sending implicit messages about possible detrimental consequences of pursuing union representation. The circumstances here can, in our view, be characterized as such a captive audience meeting and we simply cannot accept the employer's claims that this was just another routine periodic meeting which was in keeping with past practices. Nor can we accept that Catherine Wollner's decision to stay on was the only consideration that prompted the sudden need for Mr. Bryan to speak to the employees. It came through loud and clear to us that Mr. Bryan used this meeting to give the message to the employees that they

were wasting their time if they thought that the union could gain improved conditions for them. His statements to the effect that there would not, under any circumstances, be any differential between wage rates at Seattle and Victoria and also that the employees could quit if they did not like it and that he gives great references were obviously aimed at discouraging the employees from continuing with their quest for collective bargaining.

Taking all of these things together we can only conclude that when the opportunity arose to make an example of Andrew Kelly over the baggage incident on June 29, 1991, the employer seized upon this chance to further intimidate the employees, keeping in mind he was a predominant force behind the employees' attempts to have the CBRT & GW certified as their bargaining agent. It also did not escape us that at that particular time the employer was not sure whether the Board would be ordering a representation vote and we can only surmise that the firing of Andrew Kelly was intended to have an impact on the employee wishes.

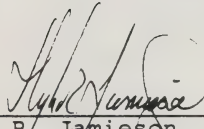

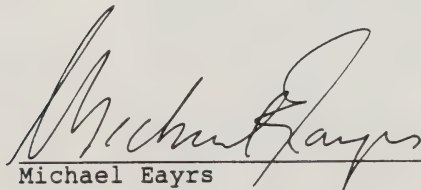
In summary, taking all of these events into account and, in light of the Board's policy of proximate cause we find that the employer did deal with Andrew Kelly contrary to section 94(3)(a)(i) of the Code.

Using the Board's powers under section 99 of the Code to remedy this situation, we hereby order the employer to forthwith cease from interfering with the employees' rights under the Code. The employer shall also reinstate Andrew Kelly immediately into his employment and compensate him for all wages and benefits which he

may have lost during the period of time between his dismissal and his reinstatement.

A formal order will not be issued at this time, however, the Board retains jurisdiction to do so should the need arise. The Board's Regional Director at Vancouver, Mr. Phil Kirkland, or his designate, is appointed to assist the parties to implement the foregoing remedies.

This is a unanimous decision of the Board.

  
\_\_\_\_\_  
Hugh R. Jamieson  
Vice-Chair  
\_\_\_\_\_  
Calvin B. Davis  
Member  
\_\_\_\_\_  
Michael Eayrs  
Member

DATED at Ottawa this 25th day of October, 1991.



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## SUMMARY

Le Syndicat Sani Mobile Outaouais, requérant, et Sani Mobile S.V.O. Inc., employeur.

Dossier du Conseil: 555-3254

Décision n°: 901

## RESUME

The Syndicat Sani Mobile Outaouais, applicant, and Sani Mobile S.V.O. Inc., employer.

Board File: 555-3254

Decision No.: 901

Le syndicat a présenté au Conseil une demande d'accréditation visant tous les employés de l'employeur. Celui-ci exploite une entreprise spécialisée dans le nettoyage industriel, la gestion des déchets et les interventions d'urgence environnementale. Le syndicat prétend que l'entreprise relève de la compétence constitutionnelle du Conseil puisqu'elle effectue du transport interprovincial.

Le Conseil a déterminé que les activités de transport sont accessoires aux activités normales et habituelles de l'entreprise, à savoir le nettoyage industriel et la gestion des déchets. Ces activités de transport n'ont pas pour effet de modifier le caractère purement local de cette entreprise pour en faire une entreprise de transport interprovincial.

The union filed an application for certification with the Board seeking to represent the employer's employees. The employer operates a company specializing in industrial cleaning, waste management and environmental emergencies. The union claims that the company comes under the Board's constitutional jurisdiction since it is involved in interprovincial transport.

The Board concluded that the transport operations are incidental to the company's regular and normal operations i.e. industrial cleaning and waste management. The transport operations do not alter the purely local nature of the company and do not render it an interprovincial transport company.

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Reasons for decision

Syndicat Sani Mobile  
Outaouais,  
  
*applicant,*  
  
*and*  
  
Sani Mobile S.V.O. Inc.,  
  
*employer.*  
  
Board File: 555-3254

---

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Messrs. Robert Cadieux and François Bastien, Members.

On record

Mr. François Morin, for the applicant; and  
Mr. Roger Leroux, president and general manager of Sani Mobile S.V.O. Inc., for the employer.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The application

On December 7, 1990, the Syndicat Sani Mobile Outaouais (the union) applied for certification seeking to represent all employees of the employer, excluding foremen and office employees. During its investigation, the Board was informed that the employer had changed its name and that the company's new name was Sani Mobile S.V.O. Inc.

When the application for certification was filed, this group of employees was not represented by a bargaining agent. However, the union was certified by the office of Quebec's Labour Commissioner General in February 1991 to represent this same group of employees, and a two-year collective agreement was concluded on February 28, 1991. This group of employees thus acquired the legal and contractual

protection afforded by the collective representation system established under the Quebec Labour Code. Despite this, the union did not withdraw the application for certification it filed with this Board even though this application became superfluous in February 1991. The parties have the right to choose the means they deem appropriate to defend and protect their interests. In doing so, however, they must be circumspect, which does not appear to have been the case here. The Board believes that the administration of justice certainly would have been better served had the union asked to withdraw its application. It did not do so.

There was no public hearing in the instant case and these reasons for decision deal with the Board's constitutional jurisdiction.

The employer did not object to this jurisdiction, just as it did not object to the jurisdiction of Quebec's Labour Commissioner General. The union, for its part, argues that the Board has jurisdiction to deal with the application because the business is engaged in interprovincial transportation.

The Board has determined that the employer's business is not a federal undertaking within the meaning of the Code and that it lacks the constitutional jurisdiction to deal with this application for certification.

## II

### Decision

#### Activities of the business

The employer's business is one of 14 separate corporate entities comprising the Sani Mobile group. Its head office

is located on Highway 309 North at L'Ange Gardien, Buckingham, Quebec. It specializes in industrial cleaning, sewer systems cleaning, managing hazardous substances and handling environmental emergencies. The members of the Sani Mobile group have access to specialized services such as the petroleum products transfer and recycling centre in Québec. Each entity must also make a financial contribution in the form of administrative fees. The employer is the group affiliate in the Outaouais Region.

The company offers hazardous waste management programs that include sampling, classification, packaging, storage and transporting of these products. It offers consulting services for the internal management of hazardous waste and the in-house planning of emergency measures, as well as services for restoring contaminated sites and recycling certain products. To carry out these activities, the company uses various techniques, such as hydrolaser and vacuum pumping or heavy duty pumping for industrial cleaning. It can use mobile units to treat oil sewage sludge or contaminated water and inspect sewer and water systems using video equipment.

The company holds a licence to transport hazardous waste. This licence is issued by Quebec's Department of the Environment under the Environment Quality Act (R.S.Q. Q-2). Under this licence, the company must use only the vehicles described therein. The company also holds a licence issued by the Ontario Ministry of the Environment under Ontario's Environmental Protection Act. Under the terms of this licence, the company is authorized to store, transport by truck or remove wastewater from a disposal system. The company does not hold any authorities from the department/ministry of transportation of either province.

Hazardous or non-hazardous residues from cleaning operations, whether industrial cleaning or sewer systems cleaning, or from the repercussions of an environmental emergency, must be transported from the site of extraction to another location, for recycling or burial. Because the company does business with Ontario companies and because disposal sites may be located in a province other than the one where the residues were recovered, Sani Mobile S.V.O. Inc. therefore crosses the boundaries of the provinces of Quebec and Ontario with its transportation equipment. Transporting waste, in connection with managing this waste, accounts for some 30% of all the company's activities. The choice of a disposal site is based on either economic considerations or the fact that certain materials can be buried in certain locations only, in Quebec or in Ontario.

#### Constitutional Jurisdiction

The relevant legislative provisions are the following:

##### Canada Labour Code

"2. In this Act,

*'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,*

...

*(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province, ..."*

##### Constitution Act, 1867

*"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, -*

...

*10. Local Works and Undertakings other than such as are of the following Classes:-*

*(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; ..."*

Two principles of jurisprudence apply when determining whether labour relations come under the provincial or the federal constitutional jurisdiction. They can be summarized as follows:

- provincial jurisdiction over labour relations is the rule, and federal jurisdiction is the exception (see Construction Montcalm Inc. v. The Minimum Wage Commission et al., [1979] 1 S.C.R. 754);

- the normal and habitual activities of the business are identified and defined having regard to the particular facts of the case, and it is these activities that the Board must consider in determining constitutional jurisdiction (see Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211, and Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225).

Having examined the file, the Board is satisfied, in this case, that industrial cleaning, managing hazardous substances and handling emergencies are the normal and habitual activities of the business and that these activities are of a purely local nature within the meaning of section 92(10)(a) of the Constitution Act, 1867 and therefore fall within provincial legislative authority.

The union's argument that the employer's business is a transportation company connecting one province with another and hence a federal undertaking within the meaning of section 2 of the Code and of section 92(10)(a) of the Constitution Act, 1867 is without merit. The fact that the business, in the course of its normal and habitual activities, engages in transportation between Quebec and Ontario, either to store products or dispose of them, does not alter the fundamental nature of its operations. Transportation, a subsidiary activity to the operation of the business's core undertaking, namely, cleaning and managing waste, does not change the initial constitutional characterization of the business.

According to case law, the percentage of transportation activities connecting one province with another is not the deciding factor. (See Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657; and [1954] A.C. 541, and Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRB no. 501).) If this transportation activity is carried on continuously and regularly, then the business comes under federal jurisdiction. This, of course, presupposes that the business is a transportation company, and not a business whose transportation activities are subsidiary to its other normal and habitual activities.

In Hurdman Bros. Ltd. (1982), 51 di 104; and 83 CLLC 16,003 (CLRB no. 394), the Board reviewed a decision of another panel that held that a business located in the National Capital Region came under federal jurisdiction because it regularly engaged in cross-border transportation between Quebec and Ontario. The Board had the following to say:

"... It is not in dispute that on occasion its operations extend beyond a provincial boundary. Is that sufficient cause to exert federal jurisdiction? We think not. A multitude of enterprises operate in more than one province. Department stores, supermarkets, oil companies, etc., have national structures linking their operations throughout the provinces. In this specific region, The Bay, Sears, Eatons, Canadian Tire, K-Mart, Beaver Lumber, and most of the construction industry, operate facilities which criss-cross the boundary, delivering merchandise to customers of other outlets or job sites. Should all of those enterprises fall within federal jurisdiction because of a geographical accident? Again, we think not.

... The fact that it services clients on either side of a provincial boundary does not constitute a 'connection between provinces', or 'extending beyond the limits of a province' as contemplated by section 2(b) of the Canada Labour Code. This Board, therefore, does not have jurisdiction to regulate the labour relations of the employer."

(pages 111; and 14,013)

In Maska Manpower Inc. (1984), 57 di 193 (CRRB no. 487), the Board had to determine whether it had jurisdiction to deal with a case involving a business engaged in leasing the services of truck drivers who, in the course of their duties, were required to cross provincial boundaries. The Board concluded as follows:

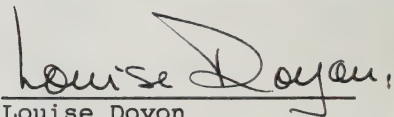
"... Viewed in isolation, Maska is not an interprovincial transportation company, any more, obviously, than are the companies that lease drivers. Merely because a large number of trucks cross provincial boundaries does not necessarily make the operation of these trucks an interprovincial transportation company. The purpose of the business is also a consideration."

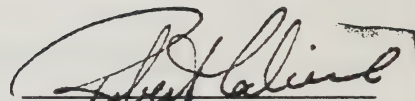
(page 203)

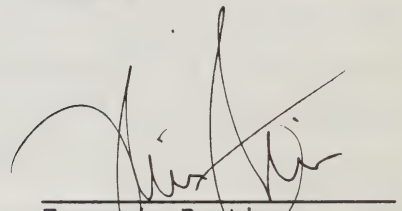
The purpose of Sani Mobile S.V.O. Inc. is to offer services for managing and cleaning industrial waste and sewer systems and handling environmental emergencies. These activities, which constitute the core undertaking for the purposes of determining the nature of the business's operations, reveal that this is not a transportation company connecting one

province with another within the meaning of the Code. For these reasons, the Board declares that it lacks the constitutional jurisdiction to deal with the application for certification.

For all these reasons, the application for certification is dismissed. This is a unanimous decision.

  
Louise Doyon  
Vice-Chair

  
Robert Cadieux  
Member

  
François Bastien  
Member

ISSUED at Ottawa, this 31st day of October 1991.

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## Summary

INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION, LOCAL 1654 AND LOCAL  
1879, APPLICANT UNIONS, AND  
MARITIME EMPLOYERS' ASSOCIATION,  
HAMILTON HARBOUR COMMISSIONERS, AND  
SEAWAY TERMINALS, RESPONDENT  
EMPLOYERS.

Board Files: 530-1790  
530-1800

Decision No.: 902

## Résumé de Décision

L'ASSOCIATION INTERNATIONALE DES  
DÉBARDEURS, SECTIONS LOCALES 1654  
ET 1879, SYNDICATS REQUÉRANTS,  
AINSI QUE L'ASSOCIATION DES  
EMPLOYEURS MARITIMES, HAMILTON  
HARBOUR COMMISSIONERS ET SEAWAY  
TERMINALS, EMPLOYEURS INTIMÉS.

Dossiers du Conseil: 530-1790  
530-1800

No de Décision: 902

The Board certified two locals of  
the International Longshoremen's  
Association as bargaining agents  
for units covering longshoremen and  
checkers respectively working for  
any and all employers engaged in  
the longshoring industry in the  
port of Hamilton. These were  
"geographical certifications"  
granted under the provisions of  
section 34(1) of the Canada Labour  
Code (Part I - Industrial  
Relations).

The Board also ordered the  
employers of persons in the two  
units to appoint an agent for each  
unit to represent them in  
collective bargaining, pursuant to  
section 34(3) of the Code. The  
current employers - members of the  
Maritime Employers' Association  
(MEA), the Hamilton Harbour  
Commissioners (HHC) and Seaway  
Terminals - were unable to agree on  
the appropriate agent for each  
group.

Although the Code does not specify  
a means of appointing an agent  
where the employers cannot agree,  
the Board decided that, in the  
absence of agreement, it had to  
assume this responsibility since  
there would be an absurdity if the  
certification established by the  
Board via section 34(1) could, in  
effect, be nullified simply by such  
a lack of agreement among the  
employers.

The Board designated MEA as the  
agent vis à vis the longshoremen  
and HHC as the agent for employers  
dealing with the checkers and  
outlined its reasons for so doing  
in the decision.

Le Conseil a accrédité deux  
sections locales de l'Association  
internationale des débardeurs à  
titre d'agents négociateurs des  
unités composées de débardeurs et  
de vérificateurs qui travaillent  
pour tous les employeurs oeuvrant  
dans le secteur du débardage dans  
le port de Hamilton. Il s'agit  
d'«accréditations géographiques»  
accordées aux termes des  
dispositions du paragraphe 34(1) du  
Code canadien du travail (Partie I  
- Relations du travail).

En outre, le Conseil a ordonné aux  
employeurs des personnes faisant  
partie des deux unités de désigner  
un mandataire en vertu du  
paragraphe 34(3) du Code pour les  
représenter dans les négociations  
collectives. Les employeurs  
actuels - membres de l'Association  
des employeurs maritimes (AEM), de  
Hamilton Harbour Commissioners  
(HHC) et de Seaway Terminals -  
n'ont pu s'entendre sur le  
mandataire de chaque groupe.

Bien que le Code ne donne pas de  
précisions sur la façon de désigner  
un mandataire lorsque les parties  
ne s'entendent pas, le Conseil a  
jugé que, en l'absence d'accord, il  
devait en assumer la responsabilité.  
Il serait absurde que  
l'accréditation accordée par le  
Conseil en vertu du paragraphe  
34(1) soit annulée pour la seule  
raison que les employeurs ne sont  
pas d'accord.

Le Conseil a désigné l'AEM à titre  
de mandataire des débardeurs et HHC  
à titre de mandataire des  
employeurs des vérificateurs et a  
donné les raisons qui l'ont incité  
à agir ainsi dans la présente  
décision.



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Reasons for decision

International Longshoremen's  
Association, Local 1654  
and Local 1879,

*applicant unions,*

*and*

Maritime Employers'  
Association, Hamilton  
Harbour Commissioners, and  
Seaway Terminals,

*respondent employers.*

Board Files: 530-1790  
530-1800

The Board consisted of Vice-Chairman Thomas M. Eberlee and Board Members Calvin B. Davis and Evelyn Bourassa.

Appearances on the record:

Alan Minsky, for the applicant unions, International Longshoremen's Association, Local 1654 and Local 1879;  
Gérard Rochon, for the Maritime Employers' Association;  
Bruce W. Binning, for the Hamilton Harbour Commissioners; and  
Alain Pilotte, for Seaway Terminals.

The reasons for decision were written by Vice-Chairman Eberlee.

(The Board's decision originally took the form of a letter to the parties (LD 936) but because of the probability of broader public interest in the matter, the Board has decided to issue it in the format of reasons for decision, although the text is virtually the same here as in the original letter-decision.)

In Maritime Employers Association et al. (1991), as yet unreported CLRB decision no. 857, the same quorum of the

Board certified Local 1654 of the International Longshoremen's Association as the bargaining agent for the following bargaining unit:

*"all employees of the employers in the longshoring industry in the Port of Hamilton employed as longshoremen save and except the employees of St. Lawrence Warehousing Limited operating as Seaway Terminals who are represented by the International Union of Operating Engineers, Local 793, and who are represented by Teamsters Local Union No. 938 and Teamsters Local Union No. 879 for bulk cargo activities."*

and Local 1879 as the bargaining agent for the following bargaining unit:

*"all employees of employers employed in the checking of cargo in the longshoring industry in the Port of Hamilton."*

These certifications were made under the provisions of section 34(1) of the Canada Labour Code (Part I - Industrial Relations). Subsection (3) of section 34 goes on to provide as follows:

*"34.(3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall order that*

*(a) one agent be appointed by the employers of the employees in the bargaining unit to act on behalf of those employers; and*

*(b) the agent so appointed be appropriately authorized by the employers to discharge the duties and responsibilities of an employer under this Part."*

In decision no. 857, the Board made the following direction:

*"So that there may be one voice on the employer side vis à vis the two new bargaining units, it will be necessary for the employers in each case - the M.E.A. members, the Hamilton Harbour Commissioners and Seaway Terminals - to appoint under section 34 an agent to act on their behalf in respect of each unit and to give each agent the authority to discharge the duties and responsibilities of an employer. Pursuant to section 34, the Board orders them to take these steps."*

The employers have been unable to agree on the appropriate agent for each unit. The question has come back to the Board for resolution.

The Board notes that section 34 does not specify a means of appointing an agent when the employers are unable to agree. It would be an absurdity if the certification established by the Board via section 34(1) could, in effect, be nullified simply by the absence of agreement by the parties on the identity of an appropriate agent to represent the employers. The Board thus concludes that in the absence of agreement among the employers, the responsibility for designating an agent must fall upon it. In this instance, the submissions of the employer parties also suggest that they expect the Board to do what they have been unable to do by agreement.

In their voluminous submissions, the Hamilton Harbour Commissioners propose that they be designated agent for the employers in respect of both units. Seaway Terminals - which had not yet entered the general cargo business and was not yet utilizing the services of persons for work in either of the described bargaining units at the time it made its submissions - supports the Hamilton Harbour Commissioners. The employers who act as stevedoring contractors in the port, and are now represented by the Maritime Employers Association, want it to be the agent for the Local 1654 bargaining unit but are prepared to appoint the Hamilton Harbour Commissioners as the agent for the Local 1879 unit.

The majority of the hours worked by Local 1654 longshoremen has been for the employers who belong to the M.E.A. This organization was set up originally for the purpose of acting as agent in industrial relations for employers who are stevedoring contractors in the major ports of Eastern Canada, generally under section 34 certifications. It is common

knowledge that it is competent and capable in this field and that its record is a good one. In the light of these facts and factors, the Board determines that it shall be the agent in respect of the employers subject to the Local 1654 certification.

With respect to the Local 1879 certification, the scheme of things in the Port of Hamilton really is that the Hamilton Harbour Commissioners enjoy a virtual monopoly over the checking work done by persons employed via that Local. Thus it makes sense for the H.H.C. to be the agent in respect of the employers subject to the Local 1879 certification and the Board so determines.

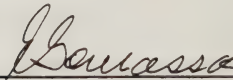
The Board now expects the various employers to clothe these agents with the authority described in section 34(3)(b) so that they will be able to "discharge the duties and responsibilities of an employer" in respect of industrial relations.



Thomas M. Eberlee  
Vice-Chairman



Calvin B. Davis  
Member of the Board



Evelyn Bourassa  
Member of the Board

DATED at Ottawa, this 26<sup>th</sup> day of September, 1991

# information

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## SUMMARY

CANADIAN UNION OF POSTAL WORKERS, APPLICANT, CANADA POST CORPORATION, EMPLOYER, CROWELL'S PHARMACY LTD., MACDONALD STATIONERY LTD., THE DELI FOOD MARKET, LAWTON'S DRUG STORES LIMITED, AND BURNSIDE PACKAGING LTD., RESPONDENTS.

Board Files: 585-247  
585-280  
585-380  
585-381  
585-383

Decision No.: 903

In the instant case, the Board rejected an application for a declaration of sale of business filed as a result of agreements concluded between the employer, Canada Post Corporation, and various retail businesses in order to enable the latter to sell stamps and provide other postal services.

The Board dealt firstly with a preliminary objection concerning its jurisdiction in this matter. It determined that the activities of the respondent businesses, namely the sale of stamps and the provision of other postal services, constituted an integral part of the postal operations of Canada Post and that it therefore had jurisdiction to hear this matter.

In the instant case, the Board noted that in spite of the agreements concluded between Canada Post and the respondent businesses, Canada Post continues to provide these same services in accordance with its statutory mandate.

The Board further noted that since these subcontracts have come into effect, there have been no lay-offs and no Canada Post employee has been hired by the respondent businesses. Therefore, it has not been established that the measures taken by Canada Post have had an impact on the bargaining rights of its employees.

The Board applied the test set out in its Canada Post Corporation (Rideau Pharmacy) decision and concluded that sections 44 and 45 of the Code do not necessarily apply in the case of the contraction of a business even though, as in the instant case, the contraction of one business may lead to the expansion of another.

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## RÉSUMÉ

SYNDICAT DES POSTIERS DU CANADA, REQUÉRANT, SOCIÉTÉ CANADIENNE DES POSTES, EMPLOYEUR, CROWELL'S PHARMACY LTD., MACDONALD STATIONERY LTD., THE DELI FOOD MARKET, LAWTON'S DRUG STORES LIMITED, ET BURNSIDE PACKAGING LTD., INTIMÉS.

Dossiers du Conseil : 585-247  
585-280  
585-380  
585-381  
585-383

Décision n° : 903

Dans cette affaire, le Conseil rejette une demande de déclaration de vente d'entreprise dans un contexte où l'employeur, la Société canadienne des postes (Postes Canada), avait conclu des ententes avec des entreprises de vente au détail leur permettant d'offrir des timbres et certains services postaux.

Dans un premier temps, le Conseil règle une question préliminaire concernant sa compétence. Il conclut que les activités des entreprises intimées, notamment la vente de timbres et la prestation de certains services postaux, constituent une partie intégrante des activités postales de Postes Canada et qu'à ce titre, le Conseil a pleinement compétence pour entendre l'affaire qui les concerne.

Le Conseil constate en l'espèce, que malgré les ententes qu'elle a avec les entreprises intimées, Postes Canada continue d'exploiter son entreprise en offrant les mêmes services postaux et ce, en conformité avec son mandat législatif.

De plus, il constate que depuis l'avènement de ces sous-contrats, aucune mise-à-pied n'a été effectuée et aucun employé de Postes Canada n'a été embauché par les entreprises intimées. Il y a donc absence de preuve que la réduction d'entreprise, dans laquelle les mesures prises par Postes Canada ont influé sur les droits de négociation établis de ses employés.

Le Conseil applique enfin le test établi dans l'affaire Rideau Pharmacy pour conclure que les articles 44 et 45 du Code ne s'appliquent pas nécessairement dans les cas de réduction d'entreprise même si, comme en l'espèce, cette réduction mène à l'expansion d'une deuxième entreprise.



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Reasons for decision

Canadian Union of Postal  
Workers,

*applicant,*

*and*

Canada Post Corporation,

*employer,*

*and*

Crowell's Pharmacy Ltd.,  
MacDonald Stationery Ltd., The  
Deli Food Market, Lawton's Drug  
Stores Limited, and Burnside  
Packaging Ltd.,

*respondents.*

Board Files: 585-247  
585-280  
585-380  
585-381  
585-383

The Board was composed of Mr. J.F.W. Weatherill,  
Chairman, Messrs. Robert Cadieux and Michael Eayrs,  
Members.

Appearances:

Ms. D. Bourque and Mr. D.W. Tingley for the Canadian  
Union of Postal Workers;

Mr. John West, Ms. Nancy Courtney and Ms. Diane Gee for  
the Canada Post Corporation;

Mr. John D. Plowman and Mr. John Rogers for The Deli Food  
Market and Lawton's Drug Stores Ltd.;

Mr. James Boudreau for Crowell's Pharmacy Ltd. and  
MacDonald Stationery Ltd.;

Mr. Robert W. Wright and Mr. David Cameron for Burnside  
Packaging Limited.

Hearings in this matter were held at Halifax on February  
25, March 19, 20, 21 and 22, and July 2, 3, 4 and 5,  
1991.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

In each of the applications before us it is asserted that the respondent Canada Post Corporation has sold a part of its business to the named merchant respondent. Each respondent is engaged in a retail sales or service business and each has entered into an agreement with Canada Post under which it provides certain postal services and sells certain postal products ("postal values" and especially stamps) to the public. In one or two cases, these agreements simply amended long-standing relationships and resulted in the establishment of what was said to constitute a "sub post office". In other cases, the relationship is typically one sought out by Canada Post as part of a marketing program, and the agreement creates a "gross margin outlet". This difference in terminology is not a difference having any practical effect as far as the issues to be determined here are concerned.

These applications were, as a matter of convenience, heard together, although they were not consolidated.

The facts in these cases are, we consider, analogous to those set out in Consumers Drug Mart (Canada Post Corporation and Family Fare Store et al. (1990), 77 di 218 (CLRB no. 808), where a similar application was made with respect to a number of retail operations in Winnipeg. Although we may refer, in the course of these reasons, to certain particular aspects of those operations in question here, we do not consider, as we have already indicated, that there are any substantial

or significant factual differences between the operations involved in the cases before us and those which were before the Board in Consumers Drug Mart, Nieman's (Canada Post Corporation and Nieman's Pharmacy (1989), 77 di 181; 4 CLRBR (2d) 161 (CLRB no. 763)) or Rideau Pharmacy (Canada Post Corporation and Rideau Pharmacy Ltd. (1989), 77 di 85; 1 CLRBR (2d) 239 and 89 CLLC 16,019 (CLRB no. 737)). The instant cases also differ from the Shoppers Drug Mart (Sheldon Manley) (Canada Post Corporation and Shoppers Drug Mart Limited (1987), 71 di 103; 1 CLRBR (2d) 218; and 87 CLLC 16,049 (CLRB no. 649)) file in that there were here, as we find, no contemporaneous closings of established postal stations in close proximity to the operations in question (we do not consider the experimental outlet in Burnside Industrial Park to be significant for this purpose, nor do we consider any of the other corporate changes to be material), and that in the present cases, the respondent merchants have not been accorded any rights of exclusivity with respect to the postal operations they carry on or the postal products they sell.

By section 44(1) of the Canada Labour Code, "business" is defined as meaning (for the purposes of sections 44 and 45 of the Code), "any federal work, undertaking or business and any part thereof". In our view, the postal operations conducted by the respondent merchants are, at least for present purposes, the same (that is, they possess the same significant material characteristics) as those which were conducted by the respondent merchant in the Sheldon Manley case. Those operations were considered by the Board to constitute an integral part of the system of postal operations in Canada, and to come

within the scope of federal legislation and within the jurisdiction of the Board. The Federal Court of Appeal stated that it was in substantial agreement with what the Board said on that subject (Canada Post Corporation v. Canadian Union of Postal Workers et al., judgment rendered from the bench, file no. A-762-87, January 28, 1988 (F.C.A.), pages 2-3). While counsel for all respondents took the position that the operations in question were not "federal", we do not consider, particularly having regard to what was said by the Federal Court of Appeal in respect of essentially similar facts, that we should reopen that question at this time. We would, however, indicate (to deal with one of the arguments that was made), that we can easily distinguish between the mere sale of stamps (as in the "stamp agencies" supplied by the respondent merchants, and perhaps also in "stamp shops"), and the provision of a significant, if not a full range of postal services as in the cases of the respondent merchants here. The former would, in general, come within provincial jurisdiction, whereas the latter have been found to be an integral part of a federal undertaking.

We shall, accordingly, proceed no further with the objection that these matters should be treated as coming within provincial, rather than federal jurisdiction.

In each of the cases before us, the postal operations conducted by the respondent merchant form a relatively small part of the respondent's business, both in terms of revenues and of capital, as well as of the time and space devoted to such activity. They make a relatively small contribution to profit, if indeed they make any.

In each of these cases, postal operations are undertaken for the purpose of bringing customers to the main business of the respondent, either because they attract customer traffic or because they complement other services offered, or for both reasons.

It may be that the respondent merchants' postal operations could not be said to constitute "stand-alone" operations, at least not successful stand-alone operations although, despite what has been said by other panels of the Board or by other Boards in this regard, we do not consider that in itself to be a valid reason for concluding that similar operations could not be considered to have been a part of Canada Post's undertaking or business. Certainly similar functions were performed, and are still performed by Canada Post and by its employees, as part of Canada Post's business.

Canada Post has entered into agreements with the respondent merchants under which the merchants are authorized to offer postal services and sell postal values in the manner described, and pursuant to which the merchants purchase at wholesale from Canada Post the "postal values" which they subsequently sell at retail. These agreements certainly do not purport to effect the sale of a business or part of a business, but of course it is the real substance of the transaction, and not its form, with which we are concerned. In many respects the arrangements made between Canada Post and the respondent merchants may be said to be equivalent to the arrangements, having greater or lesser degrees of formality, made between the merchants or some of them and other suppliers.

In the Nieman's case, the majority of the Board considered that transactions similar to those in question here constituted the contracting-out of work by Canada Post, the minority opinion in that case being to the effect that they constituted the granting of a franchise. In this regard, we would repeat what was said by the summit panel in the reconsideration application filed in respect of the Nieman's (Canada Post Corporation and Nieman's Pharmacy (1989), 7 CLRB (2d) 44 (CLRB no. 763):

"Because of the conclusion we reach in this case, we do not here decide whether or not a subcontracting or a contracting-out, however genuine, may constitute a sale or disposition of a business or part of a business within the meaning of section 44 of the Code. Nor do we decide whether the transaction or set of transactions which took place between CPC and Nieman's constituted a "subcontract" or a "franchise". It is arguable that the same transaction might be characterized both ways, although that would depend on the purpose of the characterization, since the terms are of course not synonymous. It might indeed be possible to effect a subcontract by way of a franchising or licensing arrangement. These points need not be decided here because the panel was unanimously of the view that however the transaction might be characterized, and whether or not a "corporate outlet" might be the subject of sale within the meaning of section 44, there had been no sale in the circumstances of the instant case."

As the members of the present panel indicated in the Consumers Drug Mart case, there are, in situations such as these, grounds for applying either or both of these characterizations, and there are, as well, grounds for distinguishing the present cases from what might be thought to be typical contracting-out or franchising situations, as these are found either in labour relations matters or in ordinary commercial life. As we said in the Consumers Drug Mart case, we do not consider it necessary to characterize these situations one way or the

other in order to dispose of the applications before us.

As was said in the Nieman's reconsideration application, the original panel in that case had asked itself the right question, which, put very broadly, is this: "were these circumstances in which the successor rights provisions of the Code apply?" (CLRB no. 763, p. 7).

In the subsequent Consumers' Drug Mart case, the Board considered a number of previous decisions made under sections 44 and 45 of the Code or its provincial equivalents, including the decisions in Seaspan International Ltd. (1979), 37 di 38; [1979] 2 Can LRBR 213 (CLRB no. 190); Terminus Maritime Inc. (1983) 50 di 178, 83 CLLC 16,029 (CLRB no. 402); Canada Post Corporation and Rideau Pharmacy Ltd. (1989), 77 di 85; 1 CLRBR (2d) 239 and 89 CLLC 16,019 (CLRB no. 737); and Canada Post Corporation and Nieman's Pharmacy (1989), 77 di 181; 4 CLRBR (2d) 161 (CLRB no. 763), and repeated the view there set out that: "The purpose of the material provisions of the Code, then, is to protect existing bargaining rights" (page 223). The Board then went on to consider the Saskatchewan Liquor Board case (Saskatchewan Liquor Board et al. (1985), 85 CLLC 16,039 (SLRB)), which it felt was closely analogous. That analogy holds as well for the instant cases. At page 226 of its decision in Consumers' Drug Mart the Board set out the following quotation from Saskatchewan Liquor Board, which we consider it helpful to repeat here:

"Subcontracting or contracting out can amount to a disposition within the meaning of Section 37 [case cited]. Arrangements of that kind have often been held to be outside of the scope of successorship legislation, however, because they amount to a change in the method of carrying on business rather than a transfer of the business itself. In cases of that kind,

what is transferred is generally only the predecessor's work..."

With respect to the instant cases, it must be said that Canada Post still carries on its business of providing a postal service, in accordance with its legislative mandate. The argument made in the several sale of business cases which the present union and employer parties have presented before this Board has been, in effect, that Canada Post has "sold" (the definition of that term for present purposes is of course extremely broad), a postal station - except for its bricks and mortar. The facts of these cases, with the exception of those in the Sheldon Manley case, have not supported such a conclusion. In some cases, doubt has been raised whether such a sale, even if it were to include the land, bricks and mortar of a postal station (as well, of course, as all the other aspects of the business carried on there) could amount to the disposition of a part of a viable business. We do not necessarily share those doubts, (we note the views on this point expressed in the minority decision in the Nieman's case), and we consider the Sheldon Manley decision to be a precedent to the contrary.

However all that may be, we do not consider that on the facts of these cases, which do not differ in any significant way from the facts in the Consumers' Drug Mart cases, Canada Post can properly be said to have sold any part of its business to the respondent merchants. To adapt the language of the Board in Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 612), upheld in this respect by CLRB no. 640), the

"purchaser's" business is not the same business as the one that existed before the "sale"; the same ongoing concern that existed before has not been carried forward in time. As was said in Banque nationale du Canada (1981), 42 di 352; [1982] 3 CAN LRBR 1 (CLRB no. 335, p. 376), "It must be remembered that bargaining rights are not attached to the person of the employer or employees but to the activities exercised in a given context".

In the instant cases, the respondent merchants purchase "postal values" at wholesale and market them at retail; they are licensed to perform, usually on a fee basis, certain important consumer-related functions of the postal service, but Canada Post has not, in our view, "sold" any part of its business to them within the meaning of section 44 of the Code.

It may be of interest to apply to the instant cases the "three prong test" which was applied in Rideau Pharmacy, at page 107. The general factual situation dealt with in Rideau Pharmacy is essentially similar to those of the present cases and indeed all cases in this series since Sheldon Manley. In Rideau Pharmacy the Board asked first, "In what business is the applicant union certified?" There, as here, the applicant union held bargaining rights for, among others, all employees of Canada Post in its retail postal operations, with certain exceptions. The second question was, "In what business is the alleged buyer involved?" There, as here, it must be said that each of the respondent merchants was engaged, to a greater or lesser degree, and among other things, in the retail post office business. Thirdly, it was asked, "From where did the buyer's business

originate? How did it come about?" With respect to that question, the Board concluded as follows:

"In this case, after having weighed all the factual elements before us, we find that Rideau's business, for the purpose of the successorship provisions, originated in Rideau itself.

Basically, Rideau obtained from CPC the right to start a business and started it. The new business was not inherited as a pre-existing going concern (see Terminus Maritime Inc., supra). There was no transfer, contrary to what happened in Canada Post Corporation and Shoppers Drug Mart Limited, supra.

(page 109)

In our view, the same conclusions are to be drawn in respect of each of the present cases, most especially perhaps (but in respect of all nonetheless) in those cases where the post office business of the respondent merchant had been "started" many years ago. In Rideau Pharmacy the Board went on to make the following comment:

"As we saw earlier, sections 44 and 45 are not aimed at covering whatever means of expansion of any business; they deal with issues revolving around the notion of disposition. The distinction we make does not suggest though that, if CPC had waived its right to serve a clientele, it could not have been transferring an existing business. That is an issue of fact. That was not the evidence we heard and we do not have to deal with it."

(page 109)

Those remarks also apply in the instant cases. We would add that sections 44 and 45 do not necessarily apply in cases of contraction of a business, although where, as in these cases, the contraction of Canada Post's retail business is related to the expansion of the respondent merchants' retail post office business, the question raised by the applicant's allegations is a natural one.

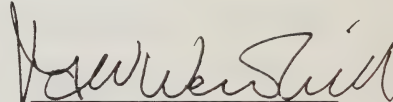
All parties agree that the purpose of sections 44 and 45

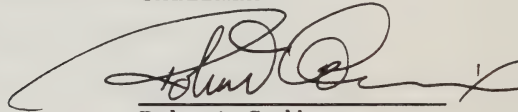
of the Code is to protect established bargaining rights (as well as those in the course of being established). In the instant cases, it was argued by the union that "as a result of these transfers we've lost bargaining rights for the retail sector in entire areas of Halifax". It is to be remembered, however, that the bargaining unit for which the applicant is the bargaining agent remains the same, both in definition and indeed in membership. The evidence is that there have been no layoffs as a result of the changes in operation which Canada Post has effected, and that no Canada Post employees have been hired by the merchants to work for them. It seems very clear that Canada Post has no intention of increasing its retail operations and thus increasing the membership of the bargaining unit and that, if the present policy is continued, the employees of franchisees will be performing, in a new context, much the same sorts of tasks which Canada Post employees, members of the bargaining unit, would otherwise perform. It does not follow from that that Canada Post has sold this part of its business. By analogy (if not an exact one), it seems clear that where a manufacturer, bound to recognize the bargaining rights of a trade union in respect of its employees goes out of business, and where a competitor as a result expands its business ("wins" or even "steals" the "business" in the sense of "trade" of its former rival), it does not necessarily follow that the competitor will be bound to recognize that bargaining agent as agent of its own employees. In Curragh Resources, supra, page 9, the question was said to be "whether the same ongoing concern that existed before has been carried forward in time", and in National Bank, supra, page 376, the Board reminded the parties that

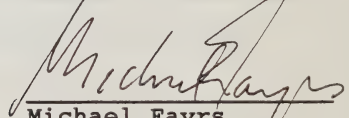
"bargaining rights are not attached to the person of the employer or employees but to the activities exercised in a given context". In the instant cases, we do not think it correct to say that Canada Post's enterprise has been carried forward in time by the merchants, and certainly the material activities are exercised in an entirely different context.

For an application such as this to succeed, a true, and not a metaphorical disposition of a business would have to be shown on the facts. In the instant cases, no such disposition has been shown.

For all of the foregoing reasons, the applications are dismissed.

  
J.F.W. Weatherill  
Chairman

  
Robert Cadieux  
Member of the Board

  
Michael Eayrs  
Member of the Board

DATED AT OTTAWA this 1st day of November, 1991.

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## Summary

STANLEY DWYER, COMPLAINANT; CANADIAN  
UNION OF POSTAL WORKERS, RESPONDENT;  
AND CANADA POST CORPORATION, EMPLOYER.

Board File: 745-3986

Decision No.: 904

## Résumé de Décision

STANLEY DWYER, PLAIGNANT; LE SYNDICAT  
DES POSTIERS DU CANADA, INTIMÉ, ET LA  
SOCIÉTÉ CANADIENNE DES POSTES,  
EMPLOYEUR.

Dossier du Conseil: 745-3986

Décision n° 904

These reasons deal with a complaint  
under the duty of fair representation  
provisions in section 37 of the Canada  
Labour Code (Part I - Industrial  
Relations) wherein the manner in which  
the union presented four grievances  
at an arbitration hearing is brought  
into question.

Les présents motifs portent sur une  
plainte de manquement au devoir de  
représentation juste prévu à l'article  
37 du Code canadien du travail (Partie  
I - Relations du travail). Le  
plaignant met en doute la façon dont  
le syndicat a présenté quatre griefs  
à une audience d'arbitrage.

The complaint is dismissed. In its  
reasons the Board reaffirms its policy  
of non-interference in the arbitration  
process except where there may be  
extreme circumstances which would  
warrant the Board's intrusion into the  
private dispute resolution processes  
under collective agreements. The  
Board also points out that it has no  
jurisdiction to deal with alleged  
denials of natural justice arising  
from the manner in which an arbitrator  
conducts a hearing.

La plainte est rejetée. Le Conseil  
confirme sa politique de non-  
intervention dans le processus  
d'arbitrage, sauf dans des  
circonstances exceptionnelles qui  
justifieraient son ingérence dans les  
mécanismes de règlement des différends  
prévus dans les conventions  
collectives. Le Conseil fait  
également ressortir le fait qu'il n'a  
pas compétence pour traiter des  
présomés dénis de justice découlant  
de la façon dont l'arbitre a mené  
l'audience.



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Reasons for decision

Stanley Dwyer,  
*complainant,*  
Canadian Union of Postal Workers,  
*respondent,*  
Canada Post Corporation,  
*employer.*

Board file: 745-3986

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The Board was composed of Vice-Chair Hugh R. Jamieson,  
and Members Ginette Gosselin and Mary Rozenberg.

Appearances: (on record)

Mr. Stanley Dwyer, for himself;

Mr. Paul J.J. Cavalluzzo, for the Canadian Union of  
Postal Workers; and

Mr. Ian Szlazak, for Canada Post Corporation.

The reasons for this decision were written by Vice-Chair  
Hugh R. Jamieson.

I

This complaint by Mr. Stanley Dwyer against the Canadian  
Union of Postal Workers (CUPW or the union) under the  
duty of fair representation provisions contained in  
section 37 of the Canada Labour Code (Part I -  
Industrial Relations) was filed with the Board on July  
26, 1991:

"37. A trade union or representative of a  
trade union that is the bargaining agent for  
a bargaining unit shall not act in a manner  
that is arbitrary, discriminatory or in bad  
faith in the representation of any of the  
employees in the unit with respect to their  
rights under the collective agreement that is  
applicable to them."

The circumstances complained about arose at an arbitration hearing on May 29, 1991 where CUPW presented four grievances on behalf of Stanley Dwyer before Arbitrator Eric K. Slone. The grievances related to discipline taken against Mr. Dwyer by Canada Post Corporation (CPC or the employer) where he was employed as a postal clerk. Mr. Dwyer had been fired by CPC on April 4, 1990. The aforesaid four grievances formed part of Mr. Dwyer's record and they were being heard separate and apart from his dismissal grievance which was to be dealt with by another arbitrator, Mr. Owen B. Shime, in September 1991.

By a decision dated June 3, 1991, Arbitrator Slone dismissed all four grievances. Mr. Dwyer now complains to this Board about the manner in which the union represented him at the arbitration hearing and also about the hearing process. To be specific, Mr. Dwyer's allegations were listed in his complaint as follows:

*"I was denied natural justice in this forum by virtue of the facts that:*

- 1) Brother Mitchell attempted to 'represent' me at the hearing.*
- 2) Brother Mitchell was not the representative of my choice.*
- 3) Brother Mitchell is not a lawyer or a labour lawyer.*
- 4) Brother Mitchell spent two (2) hours with me to prepare the case.*
- 5) Brother Mitchell refused to meet with all but one witness.*
- 6) Brother did not call on the said witness.*
- 7) The Hearing was not open.*
- 8) The hearing was not transcribed.*

9) *There is a 'Dr. Jeckell and Mr. Hyde' quality to Brother Mitchell.*

10) *The hearing had every aspects of a 'Kangaroo Court'.*"

The "Brother Mitchell" referred to by Mr. Dwyer is Mr. David Mitchell, CUPW's Regional Grievance Officer.

The remedy sought by Mr. Dwyer was also set out in his complaint:

*"1. A decision from the Board forthwith (prior to the resumption of the hearings before Arbitrator Owen B. Shime).*

*2. The Decision of Arbitrator Erik K. Slone be struck out of the records.*

*3. Counsel of my choice to continue with the hearing. The costs and expenses be paid by the bargaining unit.*

*4. All grievances as listed in the Corporation LRG630 16:19 Thursday, April 4, 1991, 180 through 183 inclusive (see attached) be dispensed with in a bona-fide manner."*

CUPW denied that it had contravened the Code and both the union and CPC submitted that the complaint be dismissed without a hearing pursuant to the Board's powers to do so under section 98(2) of the Code:

*"98.(2) The Board may refuse to hold a public hearing on a complaint made in respect of an alleged contravention of section 37 or non-compliance with section 69 if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part."*

On October 25, 1991, this quorum of the Board concluded that a public hearing was not warranted in the circumstances of this complaint because, in the Board's

opinion, even if what is alleged was proven, it still would not amount to a breach of the union's duty of fair representation.

This is one of the main elements the Board said it would be looking for when assessing whether a public hearing could be dispensed with under section 98(2) of the Code:

*"... Before deciding whether it is advisable to dispense with a public hearing, the Board will want to be sure that it has before it all of the facts and circumstances about which it would become aware of if it were to go to a public hearing. The Board will also be interested in the views of those involved as to why a public hearing should not be dispensed with. To that end, each party to a complaint will be given every opportunity to make full submissions to the Board. To assist them in doing so the role of the Board's officer will be changed from one of mediation only to a dual role of mediation and investigation.*

...

*... What we will be looking for initially are complaints that are obviously untimely under section 187(2) (now section 97(2)) or cases where, after consideration of all of the information before it, the Board is satisfied that even if what is alleged is true, the circumstances would not amount to a breach of the trade union's duty of fair representation."*

(Gordon Duncan McCance (1985), 61 di 49; 10 CLRBR (NS) 23; and 85 CLLC 16,042 (CLRB no. 515) at pages 63, 38-39, and 14,284; emphasis added)

When the Board made the decision on October 25, 1991 not to go to a public hearing in this particular complaint it had before it all of the submissions of the parties and the Board Officer's Report which was dated September 6, 1991.

II

The Board's policy regarding this type of complaint where the quality of a bargaining agent's representation at arbitration is brought into question was set out in Lucio Samperi (1982), 49 di 40; [1982] 2 Can LRBR 207; and 82 CLLC 16,172 (CLRB no. 376):

*"It would be a clear case of the tail wagging the dog if this Board were to effectively quash arbitration awards because we disapproved of the manner in which a union presented a grievance at arbitration. We do not consider it to be within the purview of our role or responsibility to evaluate the competence of union representatives or their counsel. Nor do we consider it to be compatible with the public policy purposes and objectives of party controlled compulsory grievance arbitration as a substitute for mid-agreement work stoppages expressed in section 155 of the Code (now section 57) (see the discussion in James E. Dorsey, 'Arbitration Under the Canada Labour Code: A Neglected Policy and an Incomplete Legislative Framework' (1980), 6 Dalhousie L.J. 41). The duty of fair representation has a role under the Code but it must have its limits. That limit falls short of an avenue of appeal from arbitral decisions based upon a judgement by this Board's legal and non-legally trained members about the competence and performance of union representatives and their counsel.*

*Human behaviour is too diverse for the establishment of unequivocal rules. We cannot say the duty of fair representation has absolutely no role during the arbitration process. There may be the extreme case where a union in bad faith merely puts on a charade with employer collusion or the union representative or counsel appears inebriated. Those like all cases in this area will turn on their facts. The message is, however, that this Board will not, through the duty of fair representation, microscopically review union conduct during arbitration proceedings.*"

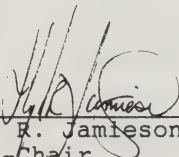
(pages 50-51, 214-215; and 15,433-15,434; emphasis added)

The issues raised here by Mr. Dwyer which basically go to Mr. David Mitchell's qualifications and how he prepared for and presented the grievances at arbitration do not even come close to being of the extreme and compelling nature contemplated by the Board in Lucio Samperi, supra, which would be necessary to cause the Board to take the extraordinary measure of interfering in the private dispute resolution mechanisms under collective agreements. Clearly, it was Mr. Mitchell's role as the union's Regional Grievance Officer to handle the four grievances in question and we, in the absence of something of an extreme nature, are not about to second guess his qualifications or how he went about his job. Mr. Dwyer's contention that David Mitchell was not the representative of his choice and also that Mr. Mitchell is not legally trained suggests a presumption on Mr. Dwyer's part that there is a right to legally trained representation of one's own choice flowing from either the collective agreement or under the union's constitution. We would be very surprised if this were so.

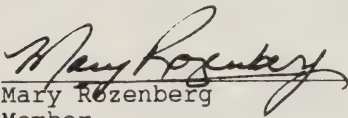
As for the other issues raised by Mr. Dwyer about the arbitration hearing not being open and that the proceedings were not transcribed, we would point out that the Board has no jurisdiction to deal with these matters arising from the conduct of the hearing which is at the discretion of the arbitrator. Under section 37 of the Code it is the union's conduct that comes under the scrutiny of the Board, it is not the arbitrator's. There are no provisions in the Code which allow the Board to review arbitration proceedings to correct alleged denials of natural justice as Mr. Dwyer is asking us to do here.

It is apparent from the submissions on file that Mr. Dwyer is very upset over the outcome of these arbitration proceedings and particularly over the findings and comments of Arbitrator Slone about his credibility as a witness, all of which could have a bearing on the outcome of his dismissal grievance. However, there is simply nothing of substance in his complaint to support the allegations that CUPW has somehow breached its duty of fair representation under the Code. The complaint is therefore without merit and it is dismissed accordingly.

The foregoing is a unanimous decision of the Board.

  
\_\_\_\_\_  
Hugh R. Jamieson  
Vice-Chair

  
\_\_\_\_\_  
Ginette Gosselin  
Member

  
\_\_\_\_\_  
Mary Rozenberg  
Member

DATED at Ottawa this 7th day of November, 1991.



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## Résumé de Décision

Syndicat des postiers du Canada, requérant, Société canadienne des postes et Muir's Cartage Ltd., intimés, et J.K. Driver Services Inc., intervenant.

Dossiers du Conseil:

560-216/585-336

560-219/585-339

560-230/585-353

560-231/585-354

N° de Décision: 905

## Summary

Canadian Union of Postal Workers, applicant, Canada Post Corporation and Muir's Cartage Ltd., respondents, and J.K. Driver Services Inc., intervenor.

Board Files:

560-216/585-336

560-219/585-339

560-230/585-353

560-231/585-354

Decision No.: 905



Décision partielle. Article 20 du Code canadien du travail (Partie I - Relations du travail). Confidentialité de documents déposés en preuve à une audience.

A la suite d'une assignation duces tecum, une décision antérieure du Conseil avait ordonné à l'employeur de remettre au procureur du syndicat des documents avant la tenue d'une audience. Ces documents devaient rester confidentiels jusqu'à ce que le Conseil en décide autrement. Commentaires publics du syndicat au sujet d'un témoignage donné au sujet de ces documents.

La présente décision traite de règles régissant la confidentialité.

Après une revue de la loi et de la jurisprudence, le Conseil a jugé que seuls deux documents demeureraient confidentiels. En ce qui a trait aux témoignages, ils n'avaient pas été donnés à huis clos et rien n'empêchait de les commenter.

Interim decision. Section 20 of the Canada Labour Code (Part I - Industrial Relations). Confidentiality of documents filed during a hearing.

Following the issuance of a subpoena duces tecum, an earlier decision of the Board ordered that the employer forward documents to counsel for the union prior to a hearing. These documents were to remain confidential until such time as the Board would decide otherwise. Public comments by union about oral evidence given on confidential documents.

This decision deals with rules that govern confidentiality.

After having reviewed the relevant legislation and jurisprudence, the Board found that only two documents were to remain confidential. Insofar as oral evidence was concerned, none had been given in camera and nothing prevented anyone from commenting on it.

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Reasons for decision

Canadian Union of Postal  
Workers,

*applicant,*

Canada Post Corporation and  
Muir's Cartage Ltd.,

*respondents,*

*and*

J.K. Driver Services Inc.,

*intervenor.*

Board Files: 560-216/585-336  
560-219/585-339  
560-230/585-353  
560-231/585-354

The Board was composed of Mr. Serge Brault, Vice-Chairman,  
and Ms. Linda Parsons and Ms. Ginette Gosselin, Members.

Appearances:

Mr. James K.A. Hayes, assisted by Ms. Julieann Barrett,  
accompanied by J. Crowell, Fourth National Vice-President,  
and Mr. Rob Vassileff, Route Measurement Officer,  
Scarborough Local, for the Canadian Union of Postal  
Workers;

Mr. Roy C. Fillion, assisted by Mr. Brett Christian,  
accompanied by Mr. Pierre Carle, counsel, for Canada Post  
Corporation; and

Mr. Peter M. Whalen, assisted by Mr. Oscar Sala,  
accompanied by Mr. Richard Muir, Vice-President, for  
Muir's Cartage Ltd.

I

These reasons for decision deal with the confidentiality  
of documents filed during the course of proceedings  
engaged inter alia pursuant to sections 35 (single

employer declaration) and 44 (sale of business) of the Canada Labour Code (Part I - Industrial Relations).

During the hearing, numerous documents were filed with the Board, many of which Canada Post Corporation (the employer or Canada Post) had requested to be treated as confidential. The Board issued a letter-decision pertaining to the non disclosure of certain documents on an interim basis. It read in part:

*"- that counsel for the applicant shall not disclose the contents of any document already filed with the Board, and classified as confidential exhibits in the course of the hearings held into these proceedings;*

*- that in view of the personal undertaking by counsel for the applicant to this effect, any document declared confidential by the Board, is to be kept confidential and used only for the purposes of this application; that additional copies of the documents made for the purposes of filing with the Board have pricing information deleted therefrom; that no further additional copies of such documents be made, and that copies of all documents classified confidential by the Board, will be returned to Canada Post Corporation or to Muir's Cartage Limited (or their respective counsel herein) upon the conclusion of the Board proceedings involving Muir's Cartage in Board file numbers 560-219 and 585-339;*

*- that Canada Post Corporation and Muir's Cartage Limited make available to counsel for the applicant at least two weeks prior to the resumption of the Muir's hearings, copies of all documents upon which each intends to rely in Muir's proceedings in Board file numbers 560-219 and 585-339, and also those documents that are covered by the subpoenas duces tecum already issued;*

*- that all said documents will be deemed confidential and their use by counsel for the applicant be governed by the terms of this order up until their filing in the course of the hearings to be held at which point the Board will decide whether they shall cease to be declared confidential.*

*The Board retains jurisdiction to vary the above directions upon the request of any party after providing the parties the opportunity to address such a request."*

(Canada Post Corporation et al., February 11, 1991 (LD 864), pages 2-3; emphasis added)

At the termination of its last hearing, the Board asked for submissions from the parties on the issue of the confidentiality of certain documents. These are documents marked 87, 88, 90, 91 (a to e), 99, and 102 (and not 100, as mentioned by counsel Fillion) to 145 and 149 (a to j).

Following directions given by the Board at the last hearing dates, submissions have been received concerning the confidentiality of these documents.

In addition, the Board received on May 31, 1991 a submission from Canada Post alleging that the Canadian Union of Postal Workers (CUPW) had violated the Board's confidentiality order issued on February 11, 1991.

According to Canada Post, the union revealed in a national communiqué some of the testimony given by Mr. André Veilleux, mainly in cross-examination, and further to a subpoena issued to Mr. Veilleux. Based on the confidentiality order, Canada Post maintains that his evidence was to remain confidential until otherwise determined by the Board.

This case raises two different issues. One is the extent as well as the purpose of the Board's interim order, and the second is its application to the disclosure of oral evidence given about confidential documents.

II

Sections 16(a) and 21 of the Code read:

*"16. The Board has, in relation to any proceeding before it, power*

*(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Board deems requisite to the full investigation and consideration of any matter within its jurisdiction that is before the Board in the proceeding;*

*...*

*21. The Board shall exercise such powers and perform such duties as are conferred or imposed on it by this Part, or as may be incidental to the attainment of the objects of this Part, including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board."*

The Board has canvassed the law on the issue of confidentiality, and in particular, a number of decisions by the labour boards of British Columbia and Ontario, as well as Supreme Court of Canada judgments. (See Cariboo College, [1982] 1 Can LRBR 445 (B.C.); Solicitor-General of Canada et al. v. Royal Commission of Inquiry into Confidentiality of Health Records in Ontario et al., [1981] 2 S.C.R. 494; and (1981), 62 C.C.C. (2d) 193; Shaw-Almex Industries Limited, [1984] OLRB Rep. Apr. 659; and Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326.)

The Board is subject to the Access to Information Act, R.S.C. 1985, c. A-1, as well as to the Privacy Act, R.S.C. 1985, c. P-21.

The thrust of the law is that Board proceedings are public and that evidence, including documents, filed with or given to the Board in the course of a hearing is accessible.

Traditionally, there are cases where documents or information may be considered privileged and, hence, confidential to a party. Such may be the case where what we now know as the Wigmore Criteria are met. In such cases, information may be afforded privilege and not be disclosed. These criteria are:

- "(1) *The communications must originate in a confidence that they will not be disclosed;*
- (2) *This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;*
- (3) *The relation must be one which in the opinion of the community ought to be sedulously fostered; and*
- (4) *The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."*

(See John Henry Wigmore, A Treatise on the Anglo-American System of Evidence, 3rd ed., Vol. 8, s. 2285 (Boston: Little, Brown and Company, 1940), page 531)

In Shaw-Almex Industries Limited, supra, the Ontario Labour Relations Board ordered that an employer produce certain documents for inspection on a date prior to the next scheduled hearing into a charge that the employer had failed to bargain in good faith. Counsel for the employer objected to the production of documents containing information concerning the salaries and benefits of certain employees on the basis that the

information was "confidential." It is the same kind of concern that led to our February interim order.

In this case, the Board ordered that those documents communicated to counsel for the union prior to the hearings remain confidential until the Board decided "whether they [should] cease to be declared confidential" (Canada Post Corporation et al., supra). Other documents filed in the course of the hearings were themselves declared confidential on an interim basis.

Referring to the Supreme Court of Canada judgment in Yar Slavutych v. T.D. Baker et al., [1976] 1 S.C.R. 254, the OLRB ruled in Shaw-Almex Industries Limited, supra, that obtaining possession of documents or information pursuant to a confidential communication is a necessary, although not in itself sufficient, condition to establishing a claim of privilege.

The Ontario Board cited the following comments of Lord Denning, as set out in Riddick v. Thames Board Mills Ltd, [1977] 3 All E.R. 677 (C.A.), with respect to the compulsory production of documents during the discovery stage of a civil proceeding:

*"The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e. in making full disclosure. ..."*

(page 687, cited in Shaw-Almex Industries Limited, supra, page 669)

The Ontario Board also quoted Lord Denning with respect to the consequences that attach to the use of legal compulsion to force disclosure of private documents:

*"... Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. ... In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, or for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years ago by Bray J:*

*'A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: nor to use them or copies of them for any collateral object... If necessary an undertaking to that effect will be made a condition of granting an order.'*

*Since that time such an undertaking has always been implied, as Jenkins J said in Alterskye v. Scott. ..."*

*(pages 687-688, cited in Shaw-Almex Industries Limited, supra, page 669)*

The OLRB referred to these passages and stated:

*"... Although the passages and cases just cited all concern production of documents on discovery in civil actions, the principles set out therein bear equal application to any legally compelled production of documents which occurs in the course of a quasi-judicial proceeding otherwise than upon the admission of the documents into evidence in a public hearing."*

*(Shaw-Almex Industries Limited, supra, page 670, emphasis added)*

These cases establish principles which could be used to protect the confidentiality of documents ordered to be produced prior to a hearing. In the Board's opinion, the OLRB did not view these principles as applying to

situations where documents are compelled to be produced in the course of a public hearing.

In Somerville Belkin Industries Limited, [1985] OLRB Rep. May 734, the OLRB discussed the nature and extent of disclosure required in sale of business and related applications. The Ontario legislation contained a provision pertaining to those applicants which expressly required an employer to adduce at a hearing all facts within its knowledge that are material to an assertion made by the applicant union. The employer wished to exclude certain documents on the grounds that they were not material to the proceedings and contained sensitive and confidential information. The OLRB referred to its decision in Shaw-Almex Industries Limited, supra, in dismissing the employer's objection. It stated:

*"It may be that the union will not be successful in its various assertions. But that does not diminish the respondents' obligation to provide the required information. Questions of relevance or concerns about confidentiality can be dealt with as they arise. Proceedings of this kind always involve the details of the parties' corporate commercial relationships, but, prima facie, there is no right to withhold the production of otherwise relevant material on the ground that it may contain confidential financial information. The Board can entertain such evidence, in camera, should that be necessary and, of course, any improper use of confidential information gained through this proceeding would be a contempt of the Board and subject to appropriate sanctions (see Shaw-Almex Ind. Ltd., [1984] OLRB Rep. Apr. 659). We do not think we should assume in advance that there would be an abuse of the Board's process."*

(Somerville-Belkin Industries Limited, supra, page 741)

Having considered the above case law, as well as the relevant legislation, the Board finds that public disclosure of documents 87 and 88 would cause harm to the future competitiveness of Canada Post and Muir's. These

exhibits contain information relating to rates of charges from Muir's to Canada Post which could damage the business of Muir's or Canada Post. Public disclosure in the circumstances of this case would likely not serve any sound labour relations or public interest purpose while non disclosure would likely serve a legitimate business interest. As for the remaining documents referred to earlier, they do not contain any information warranting that the Board continue to treat them as confidential.

Therefore, the Board determines that only documents 87 and 88 shall remain covered by the non-disclosure order.

### III

Let us now turn to Canada Post's submission concerning CUPW's alleged violation of the Board's confidentiality order of February 11, 1991. This order was expressly issued on an interim basis. Its extent and scope was to guarantee the confidentiality of certain documents until such time as the Board came to a final determination on their non disclosure.

Canada Post wants the Board to condemn CUPW for having used some of the evidence pertaining to the documents covered by our February order.

Obviously, CUPW read our initial order in a literal fashion. They did not disclose the documents themselves but rather the testimony on the documents. The Board had issued this order in order to facilitate the process by allowing parties to have access to documents prior to the hearings. This having been said, none of the evidence heard was given in camera. For that reason, there is no

point in further considering the issue since the union literature dealt only with the oral evidence.

IV

We have now established that only two documents should be treated as confidential.

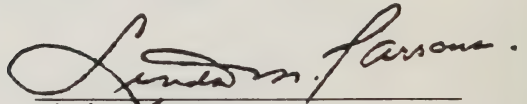
Insofar as any further documents exchanged by counsel are concerned, they will be treated as confidential and remain so until filed with the Board at the next hearing date. The matter of hearing evidence in camera will be addressed in due course, if raised by counsel.

This is an interim decision pursuant to section 20 of the Code, already communicated to the parties in letter-decision no. 937, issued October 17, 1991.



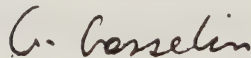
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Serge Brault  
Vice-Chairman



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Linda Parsons  
Member of the Board



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Ginette Gosselin  
Member of the Board

ISSUED at Ottawa, this 13th day of November 1991.

# information

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## SUMMARY

**C. PERETTI, COMPLAINANT, AIR CANADA, EMPLOYER.**

**Board File: 950-165**

**Decision No.: 906**

These reasons deal with a referral of a safety officer's decision to the Board pursuant to section 129(5) of Part II of the Canada Labour Code (Occupational Safety and Health). The circumstances giving rise to the referral occurred on the morning of November 9, 1990 when Mr. Peretti refused to perform his duties which consisted of loading baggage into a jet stream aircraft because he was not given protective clothing to wear to protect himself from coming into contact with glycol which was dripping from the wings of the aircraft and which had accumulated on the ground underneath.

Following an investigation into the refusal, a safety officer ruled that at the time of the work refusal, protective clothing and equipment were available for Mr. Peretti's use and therefore a danger did not exist as defined in section 122 of the Code.

The matter was referred to the Board at the request of Mr. Peretti. After inquiring into the circumstances of the safety officer's decision and the reasons, the Board confirmed the decision of the safety officer.

## RÉSUMÉ

**C. PERETTI, PLAIGNANT, AIR CANADA, EMPLOYEUR.**

**Dossier du Conseil: 950-165**

**Décision n°: 906**

Les présents motifs portent sur le renvoi au Conseil de la décision d'un agent de sécurité aux termes du paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail). Les circonstances qui ont donné lieu au renvoi se sont produites le matin du 9 novembre 1990, lorsque M. Peretti a refusé d'effectuer son travail, soit de charger les bagages dans un avion à réaction, parce qu'il ne portait pas de vêtements qui le protégeraient du glycol qui dégouttait des ailes de l'avion et qui s'accumulait au sol.

À la suite d'une enquête au sujet du refus, un agent de sécurité a jugé que, au moment du refus, M. Peretti avait à sa disposition des vêtements de protection et de l'équipement; il n'y avait donc aucun danger au sens de l'article 122 du Code.

L'affaire a été renvoyée au Conseil à la demande de M. Peretti. Après avoir fait enquête au sujet des circonstances de la décision et des motifs de l'agent de sécurité, le Conseil a confirmé la décision de l'agent de sécurité.



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Relations du  
Travail

Reasons for Decision

Ceasare Peretti,  
*complainant*  
and  
Air Canada,  
*employer*  
Board File: 950-165

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The Board consisted of Ms. Mary Rozenberg, sitting as a single member pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Kevin Whitaker for the employee, Ceasare Peretti.  
Lucie Guimond for Air Canada, the employer.

I

These reasons deal with the referral to the Board of a Safety Officer's decision under section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

Mr. Ceasare Peretti is a lead station attendant for Air Canada at Terminal 2, Pearson International Airport in Toronto. On November 9, 1990, he refused to carry out his work assignment which required him to load a twelve (12) seater commuter aircraft of Air Toronto, claiming he was in a situation of danger because he was not given protective clothing to wear to protect himself from coming into contact with glycol which was dripping from the wings of the aircraft and which had accumulated on the ground underneath.

In doing so, he invoked Section 128(1) of the Canada Labour Code (Part II - Occupational Safety and Health) which reads as follows:

*"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that*

*(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or  
(b) a condition exists in any place that constitutes a danger to the employee,*

*the employee may refuse to use or operate the machine or thing or to work in that place."*

A Labour Canada safety officer investigated the claim and found no danger. The decision of the safety officer was referred to the Board under Section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held in Toronto on March 1, 1991.

Sections 129(5) and 130(1) of the Canada Labour Code (Part II) provide as follows:

*"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."*

*"130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may  
(a) confirm the decision; or  
(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."*

II

Preliminary Submissions

At the hearing, counsel for the complainant made preliminary submissions to seek a finding from the Board that the conditions leading to the work refusal constituted a danger for the complainant, Mr. Cesare Peretti, for the purposes of section 129(2)(b) of the Canada Labour Code, Part II . Counsel requested that the Board direct the employer to take steps to guard against this danger, to protect any person from this danger and to post the direction of the Board at aircraft gates where the conditions may exist. Counsel submitted that the employer failed to comply with two obligations under the Code:

(1) The employer failed to abide by its obligation under section 128(7) which requires the employer to investigate the conditions which gave rise to the work refusal; and

(2) The employer breached its obligations under section 129 by assigning other employees to perform the work which was the subject of the refusal without having advised them of the refusal.

Counsel stated that although he appreciated that a referral under section 130(1) limits the Board's power to grant a remedy within the parameters of section 145(2), he felt that in the circumstances of this case, it was appropriate to sanction the employer for having breached its two aforementioned obligations.

Counsel for the employer submitted that under section

130(1), the Board did not have the jurisdiction to determine the preliminary matters raised by the complainant's counsel. Any finding would therefore be opposed.

After recessing to consider the submissions and the requirements of Part II of the Code, the Board gave the following oral ruling on the preliminary submissions.

*"Under section 130(1) the Board's jurisdiction is limited to reviewing the Safety Officer's report. There is no general power for the Board to go beyond this. This hearing will proceed on this issue only. Therefore, the Board is not going to deal with the preliminary matter raised by the complainant's counsel."*

### III

#### Facts

The refusal leading to this referral to the Board of a safety officer's report took place between 06:15 and 06:30 on November 9, 1990, when Mr. Ceasare Peretti invoked his right to refuse to work under section 128(1) of the Canada Labour Code (Part II).

On that day, there were four (4) jet stream aircraft at gate 74A awaiting preparation for departure times between 07:00 and 07:40. Although Mr. Peretti's shift was scheduled to begin at 06:15, he arrived at gate 74A to commence his duties before 06:00.

Mr. Peretti's work assignment required him to load a twelve (12) seater commuter jet stream aircraft for Air Toronto at gate 74A at the Lester B. Pearson International Airport, Terminal II, in Toronto on November 9, 1990.

Mr. Peretti exercised his right to refuse to work because he was not given protective clothing to wear to protect himself from coming in contact with glycol which was dripping from the wings of the jet stream aircraft and which had accumulated on the ground underneath.

He called Labour Canada to register his right to refuse.

Mr. Peretti was reassigned to work another block of planes. Bruce Brown took over Mr. Peretti's refused assignment.

Mr. Greg Garron was the safety officer assigned to conduct an investigation into the work refusal. By the time Mr. Garron arrived to conduct an investigation into the work refusal around 13:30, the jet stream aircraft that Mr. Peretti refused to load had been loaded by Mr. Bruce Brown, had departed at 07:00 for its destination and had returned to Toronto by 11:15.

Mr. Garron conducted his investigation in accordance with section 129(1), issued his decision in accordance with section 129(2) and advised Mr. Peretti by letter dated November 13, 1990 that based on the information at the time of the investigation, the work refusal could not be supported because the situation did not constitute a danger. After receiving the safety officer's decision, Mr. Peretti requested on November 14, 1990 that the decision be 'appealed' to the Canada Labour Relations Board.

IV

Testimony and Exhibits

The complainant's testimony

Mr. Peretti has a seniority date of September 15, 1969 and has worked as a lead station attendant for at least the past fourteen (14) years. He testified that he is also a long standing member of the Safety and Health Committee. The Committee meets regularly, at least once a month, and minutes of meetings are usually kept and are distributed to the Committee members.

Upon his arrival on November 9, 1990 before 06:00 at gate 74A, Mr. Peretti noticed some baggage on top of a four (4) wheeler buggy which was located outside the kiosk to the southeast side of an aircraft scheduled to depart at 07:00. The baggage had to be loaded into the cargo department of the aircraft, directly under the wings. To load the baggage onto this aircraft, Mr. Peretti testified that he and a co-worker must go under the wings of the aircraft and lift the baggage from the buggy to the cargo entrance. Because of his height, Mr. Peretti cannot stand under the wings and must kneel to lift the baggage into the cargo department. This process normally takes 4 to 6 minutes, depending on the amount of baggage going into the cargo.

Mr. Peretti testified in chief that when he went out to load the baggage, he noticed that the plane was being de-iced and that glycol was dripping from the plane. Mr. Peretti called his supervisor, Mr. Don Moodie, from a trailer/kiosk at gate 74A, about 500 feet from the work location, and asked him to come to the trailer as

soon as possible. Upon Mr. Moodie's arrival within minutes, Mr. Peretti asked him why the aircraft was sprayed before loading. He was told that it was because they had to do a defrost of the aircraft. Mr. Peretti thereupon advised his supervisor that he was refusing to work under those conditions and that he was invoking Part II of the Canada Labour Code. According to Mr. Peretti, Mr. Moodie refused to take his refusal seriously and investigate. Mr. Peretti therefore used the emergency line to contact Labour Canada, giving his name and work location.

After Mr. Peretti made the phone call to Labour Canada, Mr. Moodie reassigned him to work on an Air Ontario block assignment of flights consisting of Dash 7 and Dash 8 aircraft which according to Mr. Peretti were not sprayed with glycol because everything was dry. Mr. Bruce Brown took over Mr. Peretti's assignment.

Mr. Peretti testified that on the day of the refusal, his concern for safety arose because he was required to kneel to load the aircraft and because his pants, from the knees down, would get soaking wet from the glycol which dripped to the ground under the plane following de-icing. What prevented him from working was the glycol which was dripping above him and the glycol which had accumulated on the ground.

Mr. Peretti has an eighteen (18) inch locker where he keeps his issued uniform consisting of a polyester shirt and fifty/fifty cotton/polyester trousers; a nylon, polyester, insulated (not waterproofed) parka; rubberized gloves; and his leather safety boots when he is not working. When he is at work and wearing his uniform, he keeps his street clothes in this locker.

Also kept in this locker is his rainwear, consisting of pants and a coat, which has usually been re-issued every two (2) years since 1969. He was issued with rubberized gloves because he has to pick up cables covered with glycol and goggles (issued five (5) years ago) to prevent debris from coming into contact with the eyes. He was not issued a mask. When asked in cross-examination if goggles and a mask were not available to him, he responded that he did not say that they were not; he said he did not have them.

Mr. Peretti did not wear his rainwear on November 9, 1990. He wore a parka and regular leather thumb gloves over his Air Canada issued uniform. He wore his leather safety boots. Although he testified he normally wears his union cap with his uniform, he didn't wear anything on his head that day.

Mr. Peretti testified that since he commenced his employment with the company in 1969, he has always performed his duties before any glycol spraying was done and that spraying has always been done after the aircraft has been loaded and readied for departure. In cross-examination, Mr. Peretti testified that prior to this instance on November 9, 1990, he had never worked the jetstream aircraft before.

Mr. Peretti stated under cross that on the day of his refusal to work, he did not see the aircraft actually being sprayed, but that he noticed the dripping. His knowledge and experience led him to conclude that de-icing had taken place about twenty (20) to thirty (30) minutes prior to his arrival. Under normal circumstances, the dripping condition would last for about one (1) hour or more and on this day, November 9,

1990, the conditions were not normal.

Mr. Peretti described glycol to be an oily substance much thicker than water. It is flammable and once the fluid is on the ground, a slippery condition is created. When asked how did he know that it was glycol that was dripping, he responded that if he didn't know that by now, he should quit working for Air Canada.

With respect to protective clothing, Mr. Peretti said he would not wear his own rainwear because if he did, it would become contaminated from the glycol. There was no room in his locker to store the contaminated rainwear without contaminating his other clothing. Nor were there any notices or procedures on how to decontaminate, or on returning such contaminated rainwear to the company for decontamination and receiving a decontaminated set in exchange. Also, to go and get his rainwear, he would have had to leave his work location to go to his locker and in his opinion, if he had left his work station, his employer would have fired him. Mr. Peretti also testified that if proper protective clothing and equipment had been provided to him, he would have worked any flight, including the flight for which he exercised his right to refuse to work. He further testified that he did not know that the rainwear that he was issued was the proper apparel for him to wear to protect himself from the glycol.

According to Mr. Peretti, Mr. Moodie knew that the refusal resulted from the fact that Mr. Peretti would get soaking wet from the glycol from having to kneel under the aircraft to load the baggage. Mr. Peretti also testified that he called Labour Canada because Mr. Moodie would not investigate the matter.

Around 12:00, Mr. Peretti (still working the Air Ontario flights) was advised that a safety officer from Labour Canada was waiting for him in the office of the Manager, Commuter Operations, Ms. Mary Ann Robeson. Don Moodie (Shift Supervisor), Mike Stewart, Operations Support Manager - Ramp, safety officer Greg Garron and safety officer Robert L. Gass (Toronto West District Office) were also present.

Mr. Peretti testified that in his opinion, the safety officer did not conduct himself in accordance with the provisions, as Mr. Peretti understood them, of Part II of the Code dealing with safety investigations. Mr. Peretti felt that someone had already explained the circumstances of his work refusal to the safety officer.

#### Safety Officer's testimony

The safety officer assigned to investigate Mr. Peretti's refusal to work, Mr. Greg Garron, testified that around 9:30, Ms. Miriam French of Labour Canada's Toronto North District office received a phone call from Mr. Donald Moodie (shift supervisor) regarding a work refusal which occurred around 6:30 involving Mr. Ceasare Peretti. Ms. French contacted Mr. Peretti regarding his refusal to work.

Apparently, for reasons unknown, Mr. Peretti's phone call to the answering service was not forwarded to Labour Canada. Labour Canada's initial awareness of the work refusal came from the phone call from Mr. Moodie to Ms. French.

Mr. Garron went to the work site. He was accompanied by

Robert L. Gass, a safety officer from the Toronto West District office.

Mr. Garron and Mr. Gass reported to the office of the Manager of Commuter Operations, Mary Anne Robeson, at approximately 13:30, where they met Mr. Moodie. Officers Garron and Gass then left the office to wait for Mr. Peretti outside. Upon Mr. Peretti's arrival, he and Mr. Moodie completed the refusal to work statement. Mr. Peretti described the events leading up to his refusal to work. Much discussion followed concerning the minutes of a Health and Safety meeting concerning Glycol Testing dated November 15, 1989 and signed by both the management and union co-chairmen (exhibit #1). A Safety Awareness Bulletin containing six (6) recommendations on de-icing signed by the management co-chairman only, dated January 9, 1990 (exhibit #3) was also discussed. The situation, however, remained unresolved.

After these discussions, Messrs. Moodie, Peretti, Garron and Gass left the office and proceeded to the ramp area adjacent to gate 74A. The area where the protective equipment (rainwear, gloves, respirator, goggles) is kept for employees involved in the de-icing operations was pointed out and Mr. Moodie advised that the equipment was available for use.

Mr. Peretti proceeded to gate 74A where a similar aircraft to the one he was assigned to work on was standing. He pointed out where the baggage had to be stored under the wing and showed how he must load the baggage.

The group then proceeded to examine the equipment in the

locker storage area where Mr. Peretti works.

Mr. Peretti and Mr. Moodie were at an impasse as to whether or not the protective clothing was available. Mr. Peretti stated it's not, whereas Mr. Moodie indicated it was available if required.

Mr. Garron caucused with Mr. Gass in private. Mr. Garron considered all of the information he received that day, including the initial reports from Ms. French's telephone conversations with Mr. Moodie and Mr. Peretti (exhibit 5, item 2); the refusal to work registration (exhibit 5, item 4); his interviews with Mr. Peretti and Mr. Moodie in each other's presence; the safety committee minutes regarding glycol (exhibit 5, items 5, 6 and 12); the viewing of the work site and the available protective clothing; the equipment kept in the locker storage area; and the health hazard data contained in a Material Safety Data Sheet (exhibit 5, item 3) obtained by another safety officer. Mr. Garron arrived at the conclusion that at the time of the work refusal, protective clothing and equipment was available for Mr. Peretti's use and therefore a danger did not exist as defined in Section 122 of the Canada Labour Code, Part II. The parties were advised accordingly, verbally on November 9, 1990 and in writing, on November 13, 1990 (exhibit 5, item 8).

Safety officer Robert L. Gass, who assisted Mr. Garron during the investigation, testified that this district was his former district and that he was familiar with de-icing issues which arose between these parties during his tenure here. Mr. Gass had been involved in issuing a direction which required the availability of a respiratory mask, rainwear, goggles, rubberized gloves

and a harness for personnel assigned to glycol spraying operations. The company complied with the direction. Mr. Gass accompanied Messrs. Garron, Moodie and Peretti to see the equipment made available in accordance with the guidelines he issued. The equipment would have been made available to Mr. Peretti on his asking; furthermore, had Mr. Peretti been wearing rainwear, the situation which he complained of would not have constituted a danger. Mr. Gass stated that he agreed with the conclusion reached by Mr. Garron and had he been the officer in charge of the investigation, he would have reached the same conclusion.

#### The Employer's Testimony

Mr. Don Moodie, Mr. Peretti's supervisor, did not testify in person at the hearing because according to the employer's counsel, he was on vacation. Arrangements had already been made prior to the rescheduling of this hearing due to Mr. Peretti's unavailability and the employer did not want any further delays in this matter because of scheduling problems. A written statement, exhibit #2, was therefore submitted at the hearing on Mr. Moodie's behalf at the hearing. The veracity of the statement could not be tested by the complainant's counsel. The statement is, however, helpful in making reference to time frames which were not clear in Mr. Peretti's testimony and which were not disputed nor discounted by any evidence or testimony.

According to Mr. Moodie's statement he received a phone call from Mr. Peretti at 06:09. Aircraft was de-iced for frost around 05:00. Mr. Moodie contacted Labour Canada around 08:30 to report the work refusal. Ms.

French from Labour Canada contacted Mr. Moodie around 09:30. The investigation of the work refusal did not commence until around 13:30. It was approximately 16:00 when Mr. Garron advised the parties of his decision.

Mary Anne Robeson was also present during the investigation conducted by safety officer Garron. She testified that protective clothing is available to those who need to work with or near glycol. Regular rainwear, if it becomes contaminated, could be cleaned.

Mr. Mike Stewart, Operations Support Manager - Ramp, explained the properties of glycol. When he described the de-icing process, he stated that if de-icing is required, everything is de-iced. De-icing would be the last assignment of the midnight shift commencing at about 05:00 with commuter operations. He stated that people involved in de-icing operations were issued with rainwear which includes 'hooded' jacket, 'bibbed' pants, goggles, respirator, rubberized gloves and harness and that this gear is returned to the de-icing facilities for cleaning and decontamination upon completion of their duties. It was his experience that these items were also made available to people working near the de-icing area, including lead hands and station attendants.

Mr. Stewart also testified that he went to the site of the work refusal at approximately 06:45. He saw an aircraft from which droplets were hanging and since there had been a frost that night, it was obvious, he testified, that the aircraft had been de-iced with glycol.

Argument

Counsel for the complainant argued that the issue to decide in the instant case is whether or not in these specific circumstances, based on the evidence heard, there was a danger to Mr. Peretti as defined in Section 129(2)(b). Counsel suggests that there was an immediate danger given the circumstances at the time of the work refusal. The relevant circumstances are those which Mr. Peretti was facing at the time of the work refusal, not the circumstances which existed at the time of the safety officer's investigation. At the time of the work refusal, Mr. Peretti was facing a danger. The relevant circumstances are that Mr. Peretti was assigned the job of loading baggage into the baggage compartment of an aircraft carrier, that in order to perform this assignment he was required to kneel below the wing of an aircraft from which glycol was dripping and that management had not provided him with any protective clothing.

Counsel for the complainant also requested that the Board find that exposure to glycol is a risk whether or not protective clothing and equipment is made available. Mr. Peretti stated that he was issued a raincoat; he was not issued with goggles or a mask for skin, head or eye protection. Mr. Peretti had not been told at any time that the rainwear he was issued was the protective clothing that he should have worn. If the employer expected him to wear this to protect himself, they had not let him know that. At the time of the refusal by Mr. Peretti, it was not suggested by Mr. Moodie that Mr. Peretti go and get his rainwear or any other rainwear or protective equipment. The employer had a responsibility to make that clear to the employee. Management is

responsible for the work assigned and the way it is carried out. According to counsel, Mr. Moodie should have made his expectations clear to Mr. Peretti at the time of the work refusal. He didn't.

Mr. Garron's testimony indicates that protective clothing and equipment is available for crews who deice. Mr. Peretti was not responsible for de-icing. His assignment required him to perform his duties in an area where glycol was present.

Counsel for the complainant stated that the jurisprudence of the Board defines danger as being a risk not normally associated with the work process in the normal course of a person's duties. The work refusal by Mr. Peretti occurred during an unusual work assignment. Although he normally performs this work assignment, it is usually on other types of commuter aircraft. He had never performed this assignment on a jet stream type aircraft before. In addition, before November 9, 1989, all the loading was completed before any glycol spraying was done. For these reasons, an imminent danger not in the usual course of his duties existed and this situation therefore falls within the definition of danger as defined in the Code.

Counsel for the complainant requested the remedy outlined at the beginning, subject to modification by the Board's earlier ruling.

Counsel for the employer stated that the Board must assess whether or not there existed a danger to Mr. Peretti and if so, whether it was an imminent danger. When an employee refuses to work and is acting on the belief that a dangerous condition exists, that belief

must be based on reasonable cause. The right to refuse to work must be exercised in good faith. There are many processes in a work refusal. Discussions with the supervisor are but one of those processes. Two safety officers were involved in the investigation of Mr. Peretti's work refusal. They both concluded that there was no danger. The parties were advised of the decision and the issue was clarified. The burden of proof then rests with the complainant to prove danger. The MSDS fact sheet (exhibit #5, item 3) states that according to available information there is no evidence of adverse effects with regards to skin absorption and skin contact.

Counsel for the employer emphasized that Mr. Peretti has been a member of the Safety and Health Committee for many years and has been involved with the glycol/de-icing issue for a number of years. Mr. Peretti was not a stranger to what glycol is and to what he could have done to protect himself. An employee acting in good faith would have asked if protective clothing was available and wouldn't suggest that the supervisor bears sole responsibility to offer protective clothing. This situation was not life threatening.

According to counsel for the employer, these circumstances and excuses go to the complainant's credibility.

#### Decision

It is not unreasonable to expect employees to be concerned about the contact and exposure to chemicals in their workplaces.

Glycol is a chemical. It is a liquid which is much thicker than water. It is oily in substance and is flammable. The properties of glycol enable the chemical to be adherent yet to flow. Its fluidity allows it to get into the cracks and crevices to prevent frost and ice buildup. Glycol is sprayed on an aircraft for de-icing and anti-icing purposes.

De-icing is the removal of ice, snow and frost accumulation. Type I fluid is used. De-icing consists of the application of a heated glycol/water mixture to remove accumulated ice, snow and frost from aircraft surfaces.

Anti-icing, on the other hand, prevents the buildup of ice and snow. Type II fluid is used. Anti-icing consists of the application of concentrated or less diluted glycol based fluid to prevent ice, snow and frost from adhering to treated surfaces of de-iced aircraft.

Neither de-icing nor anti-icing are washing processes. The idea is to use either Type I or Type II fluid and an adjustable nozzle to melt the ice, snow or frost and to keep them from forming on the aircraft. Because of the expense of glycol fluids, there is a consciousness to conserve.

In the instant case, the employee, Ceasare Peretti invoked his right to refuse to work because he was not given protective clothing to protect himself from the glycol dripping from the jet stream aircraft he was required to work on and from the glycol which had accumulated underneath the aircraft. In Mr. Peretti's

opinion, he needed protection from the dripping above him and from the glycol accumulated on the ground because he was required to kneel to perform his duty of loading the baggage into the baggage compartment located under the wings of the aircraft. Furthermore, he called Labour Canada's emergency number because his Supervisor Don Moodie would not investigate his work refusal in the presence of a Safety Committee Member.

Whether or not the employer refused to investigate the work refusal, it did notify Labour Canada around 08:30. The Safety Officer was not appointed as a result of Ceasare Peretti's call around 06:30 to Labour Canada's emergency number. For reasons unknown, the details of that phone call were not forwarded to Labour Canada. The safety officer was appointed following Don Moodie's phone call to Labour Canada.

Mr. Peretti stated that if proper protective equipment had been provided to him by management, he would have worked any flight, including the one involved in the instant case. At no time during this period was there any protective clothing delivered or offered to Mr. Peretti by anyone from management. Mr. Peretti did not suggest anything nor did he ask for equipment or additional clothing to protect himself. He did not ask for permission to leave his workstation to go to his locker to obtain his rainwear. Although Mr. Peretti offered many solutions to the situation during cross-examination, none was offered for discussion or consideration with his supervisor, Don Moodie, at the time of the work refusal.

Under Part II of the Code, employees (section 126(1)) as well as employers (sections 124, 125 and 126(2)) have

duties and obligations to take all reasonable and necessary precautions to ensure the safety and health of the employee, other employees and any person(s) likely to be affected by the employee's acts or omissions.

Mr. Peretti did not wear his rainwear that day. He stated that had he left his work location to go to his locker to get his rainwear, his employer would have fired him. Mr. Peretti could have sought permission from his supervisor to leave his work location. In addition, if Mr. Peretti did become aware of the situation giving rise to his safety concerns upon his arrival at his work location at least fifteen (15) minutes prior to the beginning of his work shift, he had plenty of time to leave gate 74A, go to his locker to get the necessary clothing he required to protect himself and to return to gate 74A. His other alternative would have been to go to the storage area some 150 yards away where the protective clothing and equipment is kept.

Safety officer Greg Garron carried out an investigation which commenced on November 9, 1990 at about 13:30 and ended at about 16:00. An oral decision was issued the same day. His investigation included interviews and lengthy discussions with the employee and the supervisor involved; review of health and safety committee minutes regarding glycol (exhibit 5, items 5, 6 and 12) and the resulting distributed bulletins (exhibit 3 and exhibit 5, items 5 and 6); view of the site of the work refusal; view of the site housing the protective clothing which is available to individuals working in the spraying operations and to individuals who need to work in or near glycol; consultation of the Material Safety Data Sheet (exhibit 5, item 3); and consultation with safety

officer Gass who was present throughout the investigation and had experience with de-icing issues.

Safety officer Garron arrived at the conclusion that a danger did not exist as defined in Section 122 of the Canada Labour Code (Part II - Occupational Safety and Health). Safety officer Gass concurred with this conclusion.

The issue of glycol has been a topic of on-going discussion since November 3, 1989 between the employer and the union via the Safety and Health Committee with Ceasar Peretti as its Chairperson. The parties have attempted to provide guidelines to employees who work with and around glycol in order to reduce exposure to glycol and the risk involved with its use.

A special meeting of the Health and Safety Committee was held on November 3, 1989 to allow the Committee members to raise their concerns regarding any health hazards associated with Type I, De-icing Fluid and Type II, Anti-icing Fluid. Union Carbide representatives, the makers of glycol fluids, gave a presentation on this subject. Material Safety Data Sheets (MSDS) (exhibit 5, item 3) were distributed and explained.

During another meeting held on November 15, 1989, (minutes entered as exhibits 1 and 5, item 5), the Committee discussed the spray operations of glycol and made recommendations which were signed by both the employer and the union co-chairmen (Mr. Peretti signed on behalf of P. Lefebvre). The aforementioned meeting was followed by a distribution of an undated safety awareness bulletin (exhibit 5, item 6) over the signature of the employer co-chairman. The union co-

chairman's signature does not appear. C. Peretti is indicated as the A/co-chairman. This bulletin was distributed to all supervisors, lead station attendants and station attendants.

A safety awareness bulletin (entered in chief examination by Mr. Peretti's counsel as exhibit #3) was issued on January 8, 1990 by Mike Stewart, Operations Support Manager - Ramp. Mr. Peretti testified that he had never seen this document before because he was not at the meeting during which this bulletin was discussed. This bulletin was distributed to station attendants, lead station attendants and the Safety and Health Committee.

The evidence shows that Mr. Peretti, as a Member of the Safety and Health Committee and as a lead station attendant, would have received the safety minutes and bulletins issued with respect to the use of glycol.

Upon invoking his right to refuse and after making his phone call to Labour Canada, Mr. Peretti was assigned to another block of planes consisting of Dash 7 and Dash 8 aircraft. Mr. Peretti stated that he performed his duties on the Dash 7 and Dash 8 as these aircraft were not sprayed with glycol. Mr. Stewart's evidence indicated that if de-icing is required, then everything is de-iced. Another employee, Bruce Brown, took over Mr. Peretti's refused assignment. The necessary work was done and completed. Mr. Peretti stated that later on during the day, he returned to the work location at gate 74A to see if Mr. Moodie had notified 'the others' of his work refusal, but he does not know if they worked or not.

Mr. Peretti's evidence is not clear with respect to time frames. His own testimony indicated that he worked within a team and that he and a co-worker loaded the baggage. Mr. Peretti arrived at gate 74A before 06:00. His safety concern according to his testimony was noted immediately upon his arrival at gate 74A. If Mr. Peretti was scheduled to commence his shift at 06:15, then it would have been logical that someone else begin their shift at the same time. Additionally, if Mr. Peretti had left the work area before anyone else reported for work at gate 74A, then it would have been possible that the work refusal and the reassignment occurred prior to 06:15.

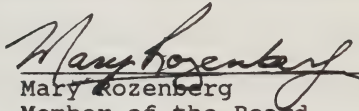
Furthermore, according to Mr. Peretti's evidence, de-icing had taken place about twenty (20) to thirty (30) minutes prior to his arrival before 06:00. The dripping would last for about one (1) hour under normal conditions. However the conditions on November 9, 1990 were not normal, yet no further evidence was offered to explain what the 'not normal' conditions were on November 9, 1990. Mr. Steward's evidence indicates that de-icing of commuter operations commences around 05:00 which is supported by Mr. Moodie's statement.

This inquiry is not an investigation into the allegation that the employer refused to investigate Mr. Peretti's work refusal. This is a referral of a Safety Officer's decision under section 129(5) of the Canada Labour Code, Part II - Occupational Safety and Health. There is therefore a requirement on the Board to analyze the safety issue which was the subject of the work refusal. The Board must direct itself to the nature and to the sufficiency of the consideration which the safety officer had given to the safety issue and to the work

refusal.

A review of all of the evidence and submissions of the parties leads the Board to conclude that protective clothing and equipment (rainwear, gloves, goggles, mask) was available to Mr. Peretti for his use at the time of his work refusal and at the time the safety officer conducted his investigation and that Mr. Peretti was aware of its availability. Had Mr. Peretti been wearing this clothing, this would have precluded the existence of any danger.

Accordingly, I confirm Mr. Garron's decision.

  
Mary Rozenberg  
Member of the Board

DATED at Ottawa, this 14th day of November, 1991.







